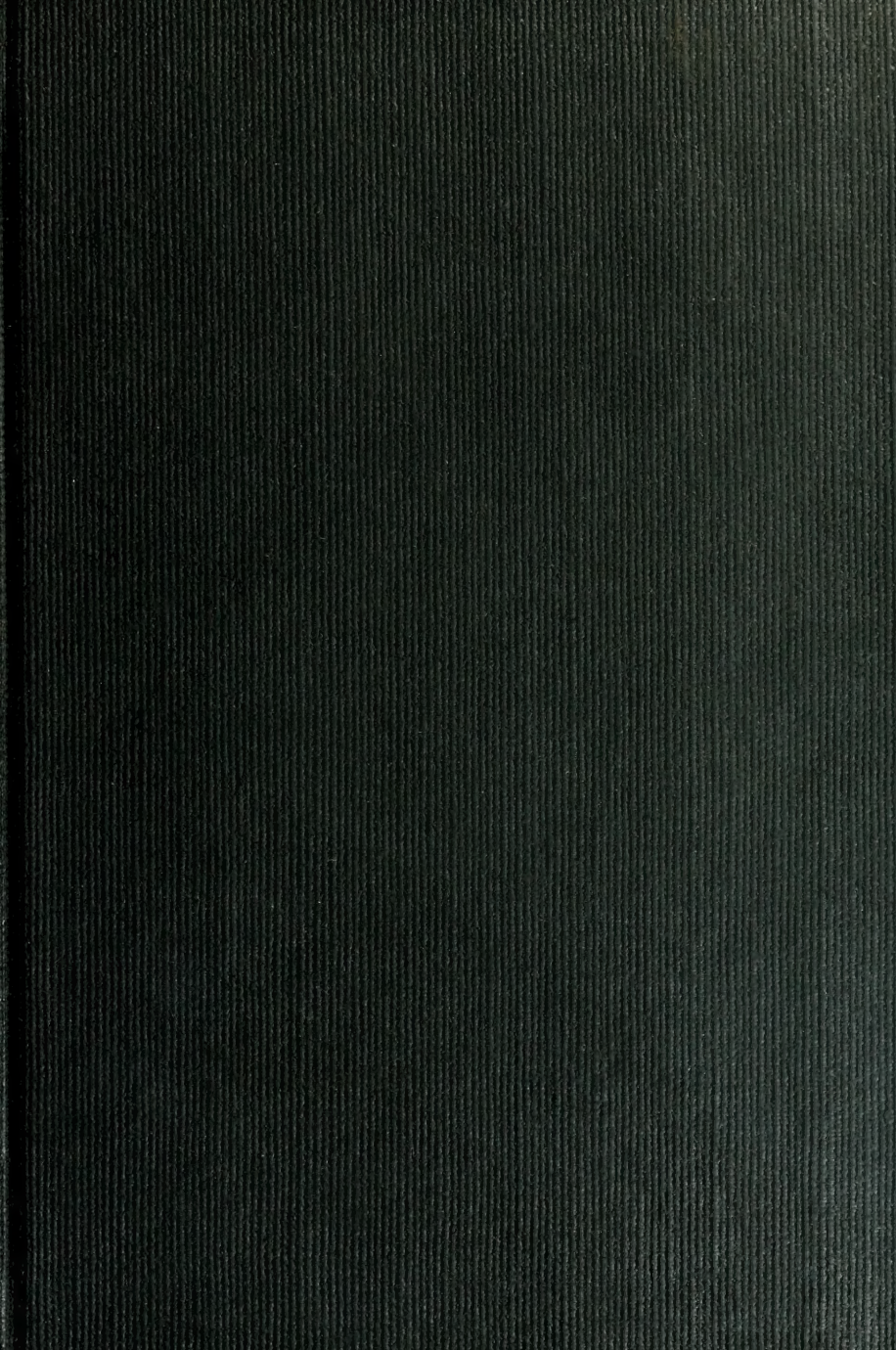






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Essays and Addresses

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The Constitutional History of Canada

BY

The Honourable WILLIAM RENWICK RIDDELL

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(November 6, 1911.)

The Constitutional History of Canada.

BY THE HONOURABLE MR. JUSTICE RIDDELL.*

ADDRESSING the first regular meeting of the Canadian Club for the season of 1911-12, Mr. Justice Riddell said:—

Before the conquest of Canada by the British in 1759-60, the government and constitution of our country were much like those of a Province of France—New France was as nearly as possible a transcript in this regard of the old France across the sea.

The King of France was represented by a Governor appointed by the King—usually a noble, who desired to replenish his coffers from the wealth of the new land; he had in Canada much the same powers as the King in France: but had always with him a watchful guardian of the interests of the King and of France, the Intendant—and the Intendant had also very large powers indeed particularly in respect of finance, police and justice. Then there was a Council, not elected but appointed, who acted as a combination of Judge, lawyer and administrator—the King, however, could disapprove and thereby nullify any act of theirs.

There was no such body as a Parliament in the English sense: but the country was governed on feudal principles.

In the country were the nobility—the noblesse—the seigniors who owned the land; they paid homage to the King, and had under them the peasants (“habitants” as they called themselves) to whom they leased land to be held on much the same terms as the lands were held by the peasantry in France. This seigniorial tenure was introduced substantially by Richelieu in 1627.

Not only did a Seignior when he succeeded to his estate pay homage to the King, his feudal superior, but when he

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sold or transferred his seigniorship he was obliged to pay a part, usually (at least in theory) a fifth part, of the purchase money to such superior. He also had the glorious privilege of being eligible to be appointed a member of the Superior Council—if the authorities saw fit,—he might also have a commission in the militia—for in time of war all the inhabitants of Canada might be called upon to do service in the army under the Governor or other commander. Very often he did not own his land in the fullest sense—frequently the Crown reserved mines, minerals, oak-timber and masts for ship-building, such lands as might be required for military purposes, and the like.

The Seigniors had in theory the right of dispensing justice, but that right was exercised by very few, and very seldom even by them.

The habitant as "censitaire" (tenant) was under many feudal obligations familiar to readers of Blackstone—for example, he was bound to take his grain to be ground at the Seignior's mill, and to pay for such grinding. If he went to another mill, that did not relieve him from paying his Seignior all the same. If a habitant, being the feudal inferior, desired to dispose of the land which he held, he was obliged to pay a substantial part of the purchase money to the Seignior; and worse, the Seignior might himself take the land within forty days of the sale. He was liable to the *corvée*, or forced labor, for his Seignior, as in France; he must give the Seignior one fish out of every dozen of those caught in Seigniorial waters; wood and stone might be taken from his land by the Seignior to build or repair manor-house, church or mill.

But while the peasants had no part in the government of the country, and were inferiors, their lot was immensely superior to that of their brethren in the old land, as they themselves were essentially superior to the peasants of old France in intelligence and manners.

The Seignior's lot might not be thought a very happy one—removed as he was thousands of miles away from Paris; and not seldom with no one of his rank with whom to associate.

But they all loved Canada—"O! Canada, mon pays, mes amours"—as their descendants do still—and no one can under-

stand the depth of that devotion who has not mingled with "les Canadiens."

They were free, bold and adventurous, frugal, industrious and moral; and made the very best of soldiers for the kind of country in which they were called upon to fight.

Next to, if not indeed sometimes above the Seigneur, was the Curé—sometimes the only one in a Seignior except (or possibly not even excepting) the Seigneur who could read and write. The essentially religious character of the French-Canadian is seen in the high place the Curé held in his regard—a place which is little lower now than it was a century and a half ago. Indeed it has been said that the Canadian Curé exercised in Canada, the power in France of the King, the noble and the priest.

But neither priest nor peasant had any part in making the laws by which they both were governed; their government was arbitrary and military; they were accustomed to obey their superiors—and anything more unlike a constitution in our latter day sense than was the mode of government of that happy and fearless primitive people it would be hard to find.

In 1759 Quebec was taken by Wolfe, and the first period of Canadian Constitutional history came to an end. All Canada in 1760 was under the power of Britain, and the military commanders in the army of the conquerors governed the land as a conquered country. But the religion of the Canadians was not interfered with. Catholics as they were, and their conquerors belonging to a Protestant nation, their law based upon the Civil Law of Rome was administered by a conqueror whose law was based on the Common Law of England. Their French customs were respected and the only strange law imposed on them was the criminal law of England, which was more merciful than their own, which permitted torture, breaking on the wheel and arbitrary imprisonment.

The definitive Treaty between Great Britain and France—the Treaty of Paris signed 10th February, 1763,—placed the allegiance of Canada beyond any doubt, as by that instrument France ceded her to Great Britain. It was not, however, till October of that year that any change was made in the government of the new country. On the 7th of October, 1763, a

Royal proclamation was issued establishing in "the extensive and valuable acquisition in America four distinct and separate Governments....Quebec, East Florida, West Florida and Grenada."

(Those of you who have studied botany may have noticed certain plants described as "Canadensis," "Canadense," which are not found in Canada at all. This is explained by the fact that when the botanical terminology was fixed, Canada included practically all the eastern part of the territory bordering on the Mississippi and down as far as Louisiana.)

Quebec, with which alone we are concerned, is defined in the proclamation in such a way as to make it wholly impossible to follow the description: and, indeed, no good end would be achieved could we at all make sure of the precise meaning of the words used.

By this Royal Proclamation, which was the beginning of the third period, the Governor was given power, with the advice and consent of the Council, to summon and call General Assemblies, and the Governor with the consent of the Council and Representatives was to make laws for the welfare and good government of the Colony "as near as may be agreeable to the laws of England." He was also, with the advice of the Council, to erect Courts of Justice to hear and determine all causes "as near as may be agreeable to the laws of England" with right of appeal to the Privy Council at Westminster.

It will be at once apparent what a tremendous change was intended to be brought about under this Proclamation. The Canadian had lived under a feudal system, looking up to and relying upon his Seigneur or feudal lord; there was now to be an Assembly of Representatives, though few of the Canadians could have any part in selecting the members: the former civil law under which they were born and had lived was to be wholly abolished and the English law introduced (think of the change if the people of Ontario were to be suddenly placed under the law of France or Germany) old customs were to become naught, and all was to be in confusion.

Courts of King's Bench and Common Pleas were in fact established, being Courts of Law and of Equity respectively;

and Justices of the Peace were appointed with inferior jurisdiction.

Many if not most of the English-speaking inhabitants of Canada came from the English colonies to the south, some too came from England; and these, Anglo-Saxon fashion, practically monopolized the control of the country—and they appear to have “run” the Courts as well. The many French-Canadians and the few British-Canadians found it impossible to agree: complaint and counter-complaint were made to the King. An Executive Council was formed, consisting of a group of officials appointed by the Governor. This was not unlike the old régime; and in it, many well-known men of the Canadian noblesse found a place.

The French-Canadians ignored the provisions for an Assembly, and it seemed impossible to get them to take any interest in a movement for such a body: it was not thought practicable to institute a representative chamber under such circumstances. Petitions were presented to the Governor signed by the British residents only, asking for a Legislative Assembly, but the Governor reported to the Home Government that the Canadians had refused to join in the petition. The main if not the only difficulty lay in religion. While the French had been by the Treaty of Paris assured of the free exercise of their religion, it was apparent that no Roman Catholic could be admitted to a British Parliamentary body consistently with the principles then professed in reference to the Parliament in the United Kingdoms—while it would be absurd to expect that the numerous French-Canadian Catholics would submit to be governed by a handful of Protestants, not one-hundredth of their number. The English did not want an Assembly with Roman Catholics in it: the French would not have one without. The English-speaking part of the community, of whom the early Governors speak in no very flattering terms, objected even to the French Catholics sitting on their own juries in their own Courts, and acted in everything in a most arbitrary and intolerant manner. The land was in a state of chaos, and the whole legal machinery paralyzed. The Canadians did not like juries, expressing their wonder that the English should think their property safer in the determination of tailors and shoemakers than in that of

their Judges. Besides, jury trials cost too much. The English had then the same firm belief in the jury system which characterizes some of their descendants to this day.

Finally, in June, 1774, the Quebec Act passed the Houses of Parliament at Westminster and the fourth period began. Notwithstanding the vigorous protest of the Corporation of London, influenced probably by the English in Quebec, and certainly affecting to act in their interest, "that the Roman Catholic religion, which is known to be idolatrous and bloody" was "established by this bill"; and notwithstanding that the King was reminded by them that his family had been called to the throne in consequence of the exclusion of the Roman Catholic ancient branch of the Stewart line (and he was solemnly told that the failure to provide in civil cases for jury trials, "that wonderful effort of human reason," was a breach of the promises made to British immigrants, and violated His Majesty's promises in His Proclamation of 1763), George III signed the Bill, and it became law, 14 Geo. III., c. 83.

This Act defined the Province of Quebec as containing all the territory now the Provinces of Quebec and Ontario and the "hinterland" of the English Colonies to the south, down the Mississippi to Louisiana. The Proclamation of 1763 was annulled, Roman Catholics were permitted to enjoy the free exercise of their religion and their clergy to receive their accustomed dues—all matters of property and civil rights were to be decided according to the laws of Canada, but the criminal law of England was to continue. A council appointed by the King was provided for which should legislate for the Colony, and there was to be an Executive Council of five as a Privy Council—the scheme for a representative and elective Assembly contained in the Proclamation of 1763 was not continued in the Statute,—the Statute, notwithstanding Fox's protest, declaring it "inexpedient to call an Assembly." The fact is that it was not thought safe to trust power to a Roman Catholic Legislature. Some American writers, who are suspicious of everything done by the British King and his Administration at or near the times we are now considering, think, or affect to think, that the Quebec Act, passed, as it certainly was, to pacify the French-Canadians, had in view a possible defection of

Canada from Great Britain to her discontented Colonies. I know of nothing to justify that suspicion:—"a jaundiced eye always sees yellow"—there is nowhere any sentiment expressed by the Canadians of anything other than fervent devotion to the Crown—the like sentiment characterizes them to-day—and it is hard to see how a French-Canadian Catholic could imagine his lot would be bettered by joining with the people of New England, the hated Bastonnais, his hereditary foes. We know that both pulpit and Congress expressed the greatest alarm at the tolerance of popery, that "blood-thirsty, idolatrous and hypocritical creed," and loudly denounced this betrayal of Protestant principle.

It is a fact not noticed by many people that the nation which boasts, and rightly boasts, that it has no established church, but that all creeds are equally recognized in the United States, began its career by protesting against allowing the French-Canadians to use their own religion in Quebec, that "blood-thirsty, idolatrous and hypocritical creed."

Notwithstanding the address of the Continental Congress of 1774, filled with philosophy and appeals to Beccaria and Montesquieu, which was signed by Henry Middleton, President, translated into French and printed in that language in Philadelphia, and then generally distributed among the Canadians, they remained loyal to the British Crown—Sir Guy Carleton "pursuing the exact reverse in every particular of the infatuated policy which alienated and lost to the Empire the thirteen Colonies." There can be little, if any doubt, that it was the Quebec Act which reconciled the Canadians to British rule and so played no small part in assuring the loyalty of Canada to the Empire.

The first Legislative Council under the new system met in August, 1775, the Act coming into force May 1st of the same year.

The inhabitants of what is now called Quebec remained in great part French; and as to those in that part of Canada there was little trouble arising from the provisions of the Quebec Act. The English remained discontented for a time with the change in the law in civil matters, but experience showed that Canadian law, based as it was on the Civil law, did not much

inconvenience the English merchant. The English criminal law was not objected to by the Frenchman,—bloody as it was, it was less barbarous than his own. But the Revolutionary War caused the immigration into the western part of that territory, afterwards Canada West, of a very large number of Loyalists who had left home and property to follow their flag and retain their allegiance. These were accustomed to English law and customs, and fretted under the foreign law to which they were subjected in Canada.

The French law and customs seemed to these vigorous and sturdy Anglo-Saxons absurd and intolerable: and the Protestantism of the newcomers was repulsive to the devout Catholic French-Canadians. The United Empire Loyalists had come from the New England States and elsewhere, and had been accustomed to freedom and self-government; they could not tolerate the irresponsible control of an appointed council, and petition after petition made its way to the King claiming relief.

The numbers rapidly increased in this western land, now Ontario, the Queen Province of the Dominion, until about 1790 there were there over 30,000 inhabitants. In Lower Canada, the disputes between the old and the new Canadians, the recent and the ancient subjects of the Crown, had continued. Of the twenty-two members who formed the first Legislative Council, eight indeed were French and Catholic, the oath of Supremacy having been graciously waived in their favor; but the English persisted in their attempt to shew “the difference between the conquerors and the conquered”—they feared or pretended to fear their loyalty, charged them semi-officially with being “rank rebels”; and in general acted as “patriots” (self-styled) are wont to act.

The Home authorities at length acceded to the request of the new colonists in the West: and the well-known Constitutional Act (31 George III. c. 31) was passed by the British Parliament. The Act was promoted by Pitt, and naturally met with strong opposition. Before the bar of the House of Commons there was heard a representative of the English colonists in Quebec: he vigorously protested against any division of the province, and demanded instead the repeal of the Quebec Act. In the House were heard the usual arguments against

Roman Catholics being admitted to a share of the government and against the imposition upon free-born Britons of foreign law which determined rights by the agency of Judges instead of juries, whose rules were those derived from the Roman law and not from the semi-divine common law of England. The merchants in London having trade relations with Canada also petitioned against it. Fox attacked the Bill as not liberal enough—he thought that Canada should have a constitution consistent with the principles of freedom. He also criticized the provision for the setting aside of lands for the support of the Protestant clergy, and objected to the division of the Colony into two parts of which one would necessarily be almost wholly French, the other English.

All opposition, however, was overborne by Pitt. By this Act, which brought in the fifth period Canada was divided into two parts, Canada East or Lower Canada, and Canada West or Upper Canada (now Quebec and Ontario). To each were given a Legislative Assembly to be elected by the people and an upper house called the Legislative Council, whose members were nominated for life by the Crown. The Crown also appointed all the public officers, including the members of the Executive Council for each Province. The free exercise of the Roman Catholic religion was once more guaranteed; and the Crown agreed to set aside one-eighth part of all unallotted Crown lands for the support of a Protestant Clergy. Some seem to think it was one-seventh, not one-eighth. But such is not the case: the agreement was to set aside one section for every seven sections granted to others. The Home authorities, also, reserved the right to levy duties for the regulation of navigation and commerce.

The object of this Act is described by Lord Granville to be to "assimilate the Constitution of Canada to that of Great Britain as nearly as the difference arising from the manners of the people and from the present situation of the Province will admit."

In Upper Canada the first Provincial Parliament met in a rough frame house at Newark (now Niagara) in 1792: and from that time onward the flood of legislation has never failed. Courts were established, the laws of England introduced,

new laws made. The Colony rapidly increased in population and wealth—in twenty years the population of Upper Canada was estimated to have risen to 77,000—and there was reasonable harmony and good-will.

In Lower Canada, the English and French Canadians continued to quarrel till the war of 1812 brought about at least an external peace. And everybody knows how the French Canadians fought during the war of 1812—not so many perhaps know how the Upper Canadians fought.

But in both Canadas, the curse of an appointed and irresponsible executive became more apparent as time went on, riches increased and affairs became more complex—benevolent despotism does not answer for any but the simplest communities.

In the Upper Province, the Executive Council became an oligarchy, nominated by the Governor from among public officers, judges, bishops, members of the Legislative Council, etc. These were a privileged class, monopolized the offices, obtained large grants of land and generally acted as irresponsible favorites of royalty are wont to act.

The Legislative Assembly began to fight against this tyranny to which freemen could not and would not submit; but the placemen long bid defiance to the popular body.

The nominated Legislative Council, too, formed on the model of the House of Lords (but not hereditary) claimed and exercised the right to reject and even to amend money bills—and as the Crown had a permanent civil list, the Legislative, representative, Assembly was helpless.

Fierce conflicts arose, the representative body claiming that the Ministers of the Crown should be responsible to them—but the body of office-holders, who were connected by social ties, common interest, and sometimes family relationship—and who were accordingly called the "Family Compact"—resisted all attacks.

A rebellion, largely due to the obstinate folly—or worse—of the Governor, broke out at length in 1837, but it was quickly quelled. Canadians were too loyal to permit of the success of a rebellion against the Crown.

In Lower Canada matters had taken even a worse course—the minority who were English in blood and spirit had grown

not only in numbers but in influence—most of the Legislative and Executive Councillors were selected by the Governors from their ranks. The French Canadians, loyal as they were, were looked upon still as a conquered people and were “kept in their place” with true British arrogance. The Assembly was naturally almost wholly French and Catholic—while the Councils were English and Protestant. The Anglo-Saxon never forgot his dearly prized superiority—his race and language continued to be the very best. When a Governor replied to an address from the Assembly in French before speaking in English, he was roundly denounced by the English press. His right to speak publicly any language but his own was denied, and the precedence given to the French language was “a base betrayal of British sovereignty” and “would lead to the degradation of the mother country.” One of the ablest of their advocates went so far as to say, “Lower Canada must be English at the expense, if necessary, of not being British”—language as significant as intelligible.

Most of the troubles, however, were financial. The Assembly made the same claims as its sister Assembly in Upper Canada and with the like success—or want of success.

Petitions were sent to the Home Government by the outraged majority, but in vain. The English openly expressed their purpose to make Quebec an English colony—and in Lower Canada also a rebellion broke out—and this also was quickly quelled. The two movements were largely independent of each other, although the “Patriots,” alias “Rebels,” in each Province were in communication with those in the other.

At this stage, the Government at Westminster induced John George Lambton, Lord Durham, to go to Canada and make a thorough investigation into the causes of the troubles and to suggest a remedy. Lord Durham's Report is still an inexhaustible well of fact from which all future historians, constitutional and otherwise, must draw. His profound sympathy with all efforts toward freedom, his knowledge of the Constitution of the Motherland and his broad human outlook all fitted him for his task. It is not too much to say, that all Canadians and all lovers of Constitutional and representative

government throughout the British world owe John George Lambton, an eternal debt of gratitude.

As the result of his efforts, the Queen's Message in 1839 recommended the Union of Upper and Lower Canada; but the Government got into trouble, and moreover there was much difference of opinion in Parliament. Finally, however, the broad Imperial views of Lord Durham—because Lord Durham was an Imperialist in the sense in which we now use the term—made their impression upon Lord John Russell, the Prime Minister, and in 1840 the Union Bill drafted by Sir James Stuart was introduced into the House of Commons by Lord John. It was passed without much change or opposition, receiving the Royal assent July 23rd, 1840, and came into force in February, 1841 (3 & 4 Vict., c. 35): and thus began the sixth period.

The main characteristic of the constitution given by this Act is that responsible government was now at length granted—Her Majesty's government in Canada were responsible to the people of Canada and not to the Home authorities. Before this, while legislative powers were given to the Provinces, responsible government was withheld—and the only remedy the people had when their grievances grew acute, was to refuse supply.

By the Union Act, however, much was to be changed. The two Provinces became the Province of Canada, for which a Legislative Assembly was to be elected with forty-two members from each section. A Legislative Council was to be nominated by the Governor, not less in number than twenty, increased from time to time as should be thought fit, the Councillors to hold office for life. The Council was to be presided over by a Speaker appointed by the Government, the Assembly elected their own Speaker. All written and printed documents referring to the election of members, summoning and proroguing of the Legislature, and proceedings of either House, were to be in English alone. The laws in force in either section of Canada were to continue in force until repealed or amended; and courts continued, etc., etc. The territorial and other hereditary revenues of the Crown were surrendered for a fixed sum—and it may be said in general that the new Constitution was as exact

a copy of that of the United Kingdom as circumstances would allow. Lord Durham wrote that it was not "possible to secure harmony in any other way than by administering the government on those principles which have been found perfectly efficacious in Great Britain," and while he would not "impair a single prerogative of the Crown," and he believed "that the interests of the people of these provinces require the protection of prerogatives which have not hitherto been exercised," still "the Crown must submit to the necessary consequences of representative institutions."

The population of Lower Canada was at this time about 630,000, while that of Upper Canada was about 470,000—the Lower Canadians felt that it was an injustice that they should have no more members than the Upper Province—those in the Upper Province thought that three English-speaking Canadians were worth at least four French Canadians,—this grievance, as we shall see, changed face before many years. The French Canadians also felt aggrieved by the proscription of their language. Their complaints were not unnatural—the provisions complained of arose from Lord Durham's view that it was necessary to unite the two races on such terms as that the English would be given the domination. (That sounds very modern, does it not?) He said, "without effecting the change so rapidly or so roughly as to shock the feelings or to trample on the welfare of the existing generation, it must henceforth be the first and steady purpose of the British Government to establish an English population, with English law and language in this Province, and to trust its government to none but a decidedly English legislature."

This object wholly failed of fulfilment,—and I venture to think it will continue to fail of fulfilment, so long as the French Canadian mother continues to do her part as she has been,—the French remained French and their influence in Parliament steadily increased. They had been ostracised politically by the first Governor, and the acceptance of a government with a French Canadian at its head by his successor struck the High Tory Duke of Wellington with horror and dismay. The first Legislative Council of twenty-four members contained eight French Canadians.

At first the government was conducted on the principle that the French were inferior; but this idea speedily vanished, and before long, prominent French Canadians became not only members, but in large measure masters of the Administration.

The Home administration had retained the power of veto upon all acts of the Legislature by means of the Governor, an Imperial Officer; and it seemed as time went by almost impossible for those in the Colonial Office (or indeed in any of the offices of the Imperial Government) to learn that parliamentary government meant the same thing in Canada as in England, and that Canadians, French or English, were much more capable of understanding and deciding what was proper for their country than any Islander in London could be. The intense conservatism—I am not using “conservatism” in the political sense at all—of the average Home Minister or official may not be considered strange when we see even Gibbon, the learned historian, using such language as this:

“If you begin to improve the constitution you may be driven step by step from the disfranchisement of Old Sarum to the King in Newgate, the Lords voted useless, the Bishops abolished and a House of Commons *sans culottes*.” Old Sarum was, you remember, a field, which had sent members to the House of Commons in early times when it was a city, and continued to do so when there were no persons living there at all. The House of Lords has, indeed, been in our own day at length, next thing to voted useless, and as for the House of Commons, there is no member there now in knee breeches, they are all found with long trousers, and so are “*sans culottes*” in very fact.

Even greater men (perhaps) were subject to the same horrifying fears, for we may notice the predictions of Robert Southey. He was a poet and a man of great capacity. They were collected long ago by Mr. Phillips of “*The Times*.” In 1803 Southey proclaimed that “the Protestant Dissenters will die away. Destroy the test and you kill them.” But it was the overthrow of Monarchy which was always in his view. “The more I see, the more I read, and the more I reflect,” he writes in 1813, “the more reason there appears to me to fear that our turn of revolution is hastening on.” In 1815 he writes: “The

foundations of Government are undermined. The props may last during your lifetime and mine, but I cannot conceal from myself a conviction that at no very distant day the whole fabric must fall." In 1816 he writes: "The only remedy (if even that be not too late) is to check the press." In 1820: "There is an infernal spirit abroad, and crushed it must be. The question is whether it will be cut short in its course or suffered to spend itself like a fever. In the latter case we shall go on, through a bloodier revolution than that of France to an iron military Government." In 1823: "The repeal of the Test Act will be demanded, and must be granted. The Dissenters will get into the corporations. (That was at the time it was suggested that a man who did not happen to belong to the Church of England might possibly not be a bad member of Parliament. The idea that a Baptist, a Unitarian, or an Anything-arian, should be allowed to buy stock in a joint stock company, was, thought to be a terrible thing in those days). Church property will be attacked in Parliament. Reform in Parliament will be carried; and then—FAREWELL, A LONG FAREWELL, TO ALL OUR GREATNESS." When the Catholic Relief Bill passed he prophesied the results: "The Protestant flag will be struck, the enemy will march in with flying colours, the Irish Church will be despoiled, the Irish Protestants will lose heart, and great numbers will emigrate, flying while they can from the wrath to come." In 1832, it was proposed, to pass the Reform Bill—"The direct consequence of Parliamentary reform must be a new disposal of Church property, and an equitable adjustment with the fund-holders—terms which in both cases mean spoliation." He was disposed to pray that "The cholera morbus may be sent us as a lighter plague than that which we have chosen for ourselves." The King threatens to make Peers! This also was suggested but the other day. "Nothing then remains for us but to await the course of revolution. I shall not live to see what sort of edifice will be constructed out of the ruins, but I shall go to rest in the sure confidence that God will provide as is best for His Church and people." Later on, in 1838, he writes: "I am not without strong apprehensions that before this year passes away London will have its Three Days." And so forth, and so forth. Robert Southey had not a keen sense of humor.

The Governors in Canada came in conflict from time to time with the Legislatures who claimed all the rights of the British Parliament: but on the whole, the new Constitution worked well—and at length the responsibility of the administration to the people's representatives was fully admitted.

The two parts of the Province were of such different laws, manners, etc., that much of the legislation was for one only of the Canadas—and gradually the theory arose that a ministry must command a majority of the members from each part. This produced endless difficulties; and it was the cause of much intrigue and "log-rolling."

The Upper Province rapidly increased in wealth and population, overtaking and passing the Lower Province by 1850; and many of its public men complained of the provision, formerly favorable to their section, that each part should have the same number of representatives. Representation by Population—"Rep. by Pop.," as it was generally called—became a watchword of a whole political party in Upper Canada.

When the Ashburton-Webster Treaty was made in 1842—the "Ashburton Capitulation," as Lord Palmerston called it—and Maine was thrust like a wedge between Canada and the British Colony to the east without consulting either colony, the attention of all British Americans was called to the necessity of a highway between the divided Colonies; this plan gave way to a scheme for a Railway, an Intercolonial Railway; and in 1852 the Governments of Canada and New Brunswick agreed to build a line down the valley of the St. John. But this plan passed from an active stage, the Colonial Minister refused to guarantee the cost. From that time on, however, Canada, New Brunswick and Nova Scotia never wholly lost sight of the project; and various attempts were made to revive it.

These and other matters influenced statesmen of all parties and Provinces to seek a remedy: and the plan of Lord Durham outlined in his Report, for the Confederation of all the British American Colonies was from time to time made the subject of discussion. He was the first man in a responsible position to recommend the Union of all the British American Colonies. As early as 1858 a responsible Minister of the

Crown in Canada, Mr. (afterwards Sir) A. T. Galt, openly advocated it and moved for the appointment of a committee to ascertain the views of the people of the Lower Provinces and of the Imperial Government. In 1861 Mr. (afterwards Sir) John A. Macdonald (first Prime Minister of Canada), while opposing the principle of Rep. by Pop. in Canada, said the only feasible scheme as a remedy for the evils complained of was a Confederation of all the Provinces. And at length in 1864 he effected an agreement with his strongest political foe, Mr. George Brown, to secure this object.

Before this time the Colonial Secretary had assured the Governor-General that any Union, partial or complete, suggested with the concurrence of the Colonies themselves would be most favourably considered.

The Lower Provinces had tired of the fruitless negotiations looking toward Union with Canada, and had in the Session of their respective Parliaments in 1864 authorized the appointment of delegates to discuss and if possible to bring about a Union of the Maritime Provinces, New Brunswick, Nova Scotia and Prince Edward Island. Newfoundland always stood aloof. A meeting of these delegates had been set for the 1st of September, 1864. The Canadians felt that it would be advisable to take advantage of this opportunity: and accordingly eight members of the Coalition Government, of both sides of politics, went to Charlottetown, met the Conference and were asked to and did express their views. The Maritime delegates are understood to have come to the conclusion that a Maritime Union was impracticable, but that a union on the larger basis might be effected. In order that the feasibility of such a Confederation might be discussed and considered from every point of view, the Charlottetown Conference was adjourned; and it was agreed to hold another Conference at Quebec, to be attended by delegates from all the Provinces interested. This Conference met in the Parliament Buildings, Quebec, 10th October, 1864, and was attended by delegates from Canada, New Brunswick, Nova Scotia and Prince Edward Island; resolutions were adopted which formed the basis of the British North America Act subsequently passed, which established the Dominion of Canada—the seventh period being the result.

Beyond any question, the American Civil War and the Trent affair of 1861 had much to do with the movement for Union. So also had the anticipated "revocation" of the Reciprocity Treaty, and when this Treaty was in fact abrogated in 1866, its abrogation has no little effect in hastening matters to a conclusion—but into that I cannot enter at the present stage, it is too complicated and extensive a question.

The Imperial Government expressed their approval of the proposed scheme as soon as it was brought to their notice (with two exceptions of no moment for our present discussion). The United States also expressed approval in general.

Both Houses of Parliament in Canada approved of the scheme in 1865 by large majorities; the New Brunswick Government, however, met with defeat at the polls when they ventured on an appeal to the electorate without bringing the question before the Legislature. The Nova Scotia House of Assembly in 1866 gave their adherence to the project by a majority vote of 31 to 19; and in the same year the former Government in New Brunswick were returned by a large majority at a new election; this new election had been ordered by the Governor by what many would consider a piece of sharp practice. The whole story certainly makes amusing reading. The House in that Colony also approved the plan by a large majority.

In 1865, and again in 1866, Prince Edward Island by her Legislature had in emphatic terms refused to enter into the proposed Union. Canada, New Brunswick and Nova Scotia sent delegates to England for the necessary legislation by the Imperial Parliament. Prince Edward Island was again invited to join and its representative, the Premier, then in London, was favorably impressed with the terms offered; but on his return home, his government was defeated.

Accordingly the British North America Act (30-31 Vic., c. 3) was passed by the Parliament at Westminster in 1867, creating the Dominion of Canada, composed of four Provinces, Ontario (formerly Upper Canada), Quebec (formerly Lower Canada), Nova Scotia and New Brunswick. On the 1st of July, 1867, was the first "Dominion Day" celebrated.

It was the common belief then and since that the delegates desired that Canada should be called the "Kingdom of Canada,"

so as to show our equality with the other "Kingdoms" across the sea. And it was believed at that time by many and is still by some that the United States objected to this title. I do not know of any reason for that belief. At all events, while "Kingdom" had been suggested, we were for some reason or other called the "Dominion" of Canada.

In 1869, another offer was made to Prince Edward Island, but this was also refused. Negotiations, however, renewed in 1872, were more successful,—they had got into financial difficulties in that little Province,—and the Island joined the Dominion as a Province, 1st July, 1873, the formal Order-in-Council being dated at Windsor, 26th June, 1873.

In the meantime the Dominion had bought out the Hudson's Bay Company in 1870; and out of part of the territory so acquired was formed the province of Manitoba by Act of the Dominion Parliament, 33 Vic., c. 3, 12th May, 1870.

In the far West was the island of Vancouver, made a Crown Colony in 1859, but reunited with the mainland in the Colony of British Columbia in 1866. In 1870 an arrangement was entered into that this Colony should also join the Dominion upon condition of the construction by Canada of the Canadian Pacific Railway. The Union was effected 30th July, 1871, by an Order-in-Council at Windsor, 16th May, 1871.

More recently two more Provinces have been formed out of part of the enormous territory of our Great West, viz., Alberta and Saskatchewan, constituted by the Acts of the Dominion Parliament, 1905, 4 & 5 Edward VII, c. 3, and c. 42, coming into force 1st September, 1905.

The remainder of the Continental British territory is divided into the Yukon and North West Territories, the districts of Keewatin and Ungava, and Labrador, this last under the care of Newfoundland. Newfoundland had not been officially represented at the Charlottetown and Quebec Conferences, but the resolutions of the delegates to the Quebec Conference contained a provision that she might enter the proposed Union, and set out the terms upon which she might do so. The British North America Act made provision for such a proceeding; and there were negotiations of a more or less informal kind looking to her coming into the Dominion. In 1868, terms of Union were

arranged with the Government of the Island, but that Government suffered defeat at the polls and the arrangement was not carried out. At least once since that time, representatives from the "Ancient Colony" have come to Ottawa with a view to their country uniting her fortunes with those of the Dominion; but the negotiations proved abortive; and Newfoundland still stands alone.

The Dominion of Canada has thus her nine provinces, all of which have (speaking generally) the same legislative rights and powers.

The Dominion has a Parliament of two Houses, the House of Commons elected by the people in each Province in proportion to the population, an adjustment being made after each decennial census, and a Senate in which each Province has its representatives to a number fixed by statute,—these are appointed for life by the Crown, i. e., the Government of the day. The Dominion Parliament legislates for the whole Dominion, has full jurisdiction over criminal law, customs tariff, and generally everything which would affect the whole Dominion.

The Governor-General, appointed by His Majesty, i. e., by the Administration at Westminster, represents the King; but he is guided, as the King is, by the advice of his constitutional advisers.

The Provinces have (except Quebec and Nova Scotia) only one Chamber in their Legislature—Quebec and Nova Scotia have also Legislative Councils appointed for life by the King, i. e., the local Ministry for the time being.

In each Province is a Lieutenant-Governor appointed by the Ottawa Administration for a term of years: he represents the King; and the office of Lieutenant-Governor is the only part of the Provincial Constitution which the Province (speaking generally) cannot amend or alter. The Lieutenant-Governor is the head of Society; but like his superior, the Governor-General, he takes no part in politics or legislation.

The legislation of the Provinces is confined to local matters, although these are of enormous importance: all matters of property and civil rights come within the ambit of the jurisdiction of the Provinces.

When the Fathers of the American Revolution came to frame a Constitution for the new nation, they extracted from the British Constitution and from other sources what they conceived to be the true principles of government, and reduced these principles to a written form. The result is a hard and fast limitation of the powers of Executive and Legislature. It is plain, I venture to think, that those who framed the Constitution of the United States had not that perfect trust in the wisdom of their people and their descendants of which we so often hear. It seems to me that the document, magnificent as it is, displays not trust in but distrust of the people—doubt as to their use of their freedom. However that may be, it is certain that there are many constitutional limitations which neither government nor people can transgress. Using the word “constitution” in the sense in which it is used in the United States, the Constitution of Canada may be described by a parody on the famous chapter on the snakes of Ireland—“There are no snakes in Ireland.” Our Constitution is not only in theory but also in fact similar in principle to that of the United Kingdom—and there Parliament can do anything that is not naturally impossible,—“It is a fundamental principle with English lawyers that Parliament can do everything but make a woman a man and a man a woman”: and within the limits of subject and area, our Parliament and Legislatures are supreme and have the same authority as the Imperial Parliament itself. The only function of the Courts in this regard is to decide whether the subject legislated upon is within the list of subjects given to the legislating body, and to determine the meaning and application of the enactment.

I have in an article in the *Canadian Monthly*, June, 1910, drawn a comparison between the Constitutions of the two countries, and I do not here pursue the enquiry.

Canada is mistress in her own house: Canadians are subjects not of the people of England but of the King of Great Britain and Ireland and of the British Dominions beyond the Seas, who is equally the King of the people of England. How often you hear it said that we are subjects of England! we are nothing of the kind: we are subjects of him who is King of Canada, in the same way that he is King of England, and he is equally

King of the English as of the Canadians. We pay no tribute to that King but the tribute of love and well deserved loyalty. We, free, happy and prosperous under that King, do not desire to change our allegiance or our condition for any other on earth. The King unites all the British folk together, and is the bond of union of all the English-speaking peoples except those of the Union to the south of us. We British live in amity and harmony together, and we rejoice to think that for more than a hundred years, spite of troubles neither few nor small, misunderstandings and competition, we have lived without war with our separated brethren of the United States. And we rejoice to know that the nations are growing closer together, each country to live out its own life and work out its own destiny, but each confident at all times of the warmest sympathy and most cordial co-operation of the other.

I conclude by pointing out that throughout our whole history, at least from 1792 two facts stand out prominently, two principles have ever been kept in view.

First, our insistence on British Connection. Ontario, Upper Canada, was settled to a great extent by United Empire Loyalists—with them loyalty was a passion, and it has not been bred out in their descendants. And practically all who came to this Province participated in the same feeling. We have steadily resisted the suggestion either to go off by ourselves or to join any other nation in allegiance. What Upper Canada did, so did Lower Canada—the heart of the French Canadian is loyal and always has been. True, there have been temporary ebullitions, froth has now and again covered the mighty deep and masked its real condition. But then and now the great mass of French Canadians are true to British Connection as the needle to the pole.

But while we have insisted that the British flag shall be ours, there is another principle we have never lost sight of—we have kept steadfast to this principle in fair weather and in foul—sometimes amidst trouble and misunderstanding, and sometimes even what almost looked like revolt—we have determined to govern ourselves. The Englishman, Scotsman, Irishman, Frenchman, who came out to Canada, could not be made to believe that he had left his brains behind him or that he had

forgotten how public affairs should be conducted. He did not believe that those who had not come out but had remained behind, knew more than he. And his descendants do not admit and never have admitted that the descendants of those who remained behind are better than the descendants of those who came to Canada. And Canadians of all kinds have confidence that they are able to govern their own land without interference by any people, British or otherwise. And so we shall remain British, and as British we shall govern ourselves—and we are content.

NOTE.

Perhaps the following chronology may be of value—or at least interesting:—

- 1758 First Legislative Assembly in Nova Scotia;
- 1759-60 Conquest of Canada;
- 1760 Military Rule in Canada;
- 1763 Formal Cession of Canada and Royal Proclamation;
- 1769 Prince Edward Island formed into a separate Province, being divided from Nova Scotia;
- 1774 The Quebec Act;
- 1784 First Legislative Assembly in New Brunswick;
- 1791 Constitutional Act;
- 1792 First Legislative Assembly in Upper Canada and in Lower Canada;
- 1832 Legislative Council formed in New Brunswick;
- 1837-38 Rebellion in Upper and Lower Canada;
- 1838 Legislative Council formed in Nova Scotia separate from Executive;
- 1840 Union Act;
- 1841 First Canadian Parliament for United Canada;
- 1848 Responsible Government fully recognized in New Brunswick;
- 1848 And in Nova Scotia, having been partially recognized in 1840;
- 1850 Prince Edward Island obtains full responsible government;
- 1858 British Columbia a Crown Colony;

- 1866 British Columbia and Vancouver Island united as one Colony;
1867 British North America Act;
1870 Province of Manitoba formed;
1870 N. W. Territories organized with a Lieut.-Governor and small nominated Council;
1871 British Columbia admitted into Dominion;
1873 Prince Edward Island admitted;
1876 Manitoba abolished Legislative Council;
1888 N. W. Territories receive a Legislative Assembly;
1904 Provinces of Alberta and Saskatchewan formed.
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MARYLAND QUARTERLY

THE INTERNATIONAL RELATIONS BETWEEN
THE UNITED STATES AND CANADA—
AN HISTORICAL SKETCH

BY

WILLIAM RENWICK RIDDELL

Justice, King's Bench Division, High Court of Justice, Ontario

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BY

WILLIAM RENWICK RIDDELL

(This address, delivered at the Conference of the American Society for Judicial Settlement of International Disputes, at Washington, December 15-17, will also appear in the printed proceedings of the Conference.)

The position of Canadians is in some respects a little singular. Associated as we are, united with the mother country, the British Empire, by ties of loyal sentiment,—a silver cord which, please God, will never be broken,—politically we belong to the British Empire. Socially, commercially, financially, we in large measure belong to the continent of which we form a part. * * * A Canadian necessarily, by reason of his position, is inclined to look with a great deal of interest, and sometimes with no little anxiety, upon his international relations with the larger, more populous and wealthy and stronger nation on the South. A nation of eight millions by the side of a nation of one hundred millions must needs look with anxiety upon anything which might induce armed conflict; and be pleased and gratified at any movement or arrangement which may remove from probability or possibility indeed, anything in the nature of physical force.

The Reciprocity Treaty of 1854 was terminated in 1866 by the United States with almost the avowed

object of forcing Canada to renounce her allegiance to the British Crown upon penalty of being ruined commercially and financially. But much water has flowed under the bridge since then and the *status quo* as to nationality is accepted by all as satisfactory. We are no longer suspicious of the United States. The people of the United States are now content to let us work out our own destiny, standing by our side, holding up with us an example of freedom, liberty and right; and they are willing that there shall be two great English-speaking nations upon this continent, and not, as was expected at one time, only the one. This I say because history so speaks. * * *

During the latter part of the Eighteenth Century and earlier, Canada was a matter always of anxiety, a source of anticipated peril, to the English colonies; and when the time came in 1759 to wrest that land from the French, the colonies gladly contributed their quota of men. Massachusetts furnished 7,000 men, nearly one-sixth of all her men capable of bearing arms. Connecticut turned out five thousand men. New Jersey, then as now, ambitious and active, although she had lost one thousand of her sons very shortly before, contributed another thousand; and the two battalions of Royal Americans were not the least effective of the warriors in Wolfe's Army. They succeeded. Quebec fell, and what Vergennes, the French Ambassador, had prophesied and what, indeed, had been foreseen by some few thoughtful Englishmen and more Frenchmen took place. The pressure of French Canada on the English colonies was removed; the latter had opportunity and leisure to consider their

relations with the mother country: and the result is history.

I have no time and no desire to enter into the long tale of that fratricidal strife between the insular British and their brethren on this continent, that long story of mismanagement, blundering, misunderstanding and folly; although that story is also full of deeds of self-sacrifice and noble valor. But Canada was not forgotten. It was understood and believed on all hands, as any one can read in the history of the Continental Congress, that the union of the English-speaking colonies would not be complete without Canada being taken in also. It was moreover recognized that Canada, remaining out of the Federation, would form the base of attack; and Britain would pour fresh troops in from that quarter. The freedom and repose of the colonies could, it was thought, never be secure with Canada in hostile hands on their border. The fact was heralded that Sir Guy Carleton, Governor of Canada, had not been wholly successful in reconciling the French "habitant" to British rule. The feudal aristocracy had gone, the fungoid growth of *noblesse* had been removed in 1763, but the "habitant" had been left behind under the British flag. Sir Guy Carleton had done his best and had, at least, in part, as was supposed, failed. General Schuyler was sent north that he should occupy Canada and induce her to become a part of the American Union. General Schuyler fell sick, and the ill-fated Montgomery succeeded him. He led his forces without much opposition to the frowning cliffs of old Quebec where he fell. * * * Not satisfied to rely upon military

persuasion alone, your people tried the printing press also. Benjamin Franklin, Charles Carroll of Carrollton and Samuel Chase were sent to Montreal, then in the hands of General Wooster and the American forces; and they took with them a French printer named Mesplets, picked up in Philadelphia. The printing press proved as futile as the musket. * * * Well, I am not going into the story of the repulse at Quebec, of the battles which took place, of the suffering of the American forces and of the bravery upon both sides. That war, which never should have begun, came to an end. The war between the two parties, the English people on this side the Atlantic and upon the other, came to an end; and then the race showed their common sense. If there is anything upon which an English-speaking individual prides himself, it is common sense. The common sense of the people, and their desire to be governed by law, showed itself in Jay's treaty of 1794, the first treaty after the initial treaty of 1783. By it, practically all matters in dispute between the nations were to be left to arbitration. Since that time until the treaty of 1909, which was (except in form) made between the United States and Canada, nearly all matters in dispute between the two peoples have been disposed of by arbitration, or by being left to some person to deal as a judge with the questions in dispute.

In the Definitive Treaty of Peace, concluded September 3, 1783, it was provided that the middle of the River St. Croix should at a certain place be the boundary line between the territories. Moreover, the starting point was to be determined by the source of

the St. Croix. Doubts arose as to the river meant, and in the Treaty of Amity, Commerce and Navigation, concluded November 9, 1784 (Jay's Treaty, the starting point of international arbitration) it was by Article V provided that the determination of the question as to what river was meant in the Treaty of Peace by the "River St. Croix" should be decided by three commissioners, one appointed by each country, these two to appoint the third. The commissioners were to give the latitude and longitude, of the source, and to describe the river. By a subsequent Treaty of March 15, 1798, these commissioners were relieved from particularizing the latitude and longitude of the source, but they were still to describe the river, and as soon as they determined the source, a monument was to be erected to prevent any uncertainty. The Treaty of 1794 also provided by Article IV for a joint survey for the purpose of ascertaining whether the Mississippi extends so far northward as to be intersected by a line to be drawn due west from the Lake of the Woods, the contracting parties agreeing that if not, they would regulate the boundary at that point by amicable negotiation.

And Article VI provided for a Board of Commissioners, five in number, two appointed by each party and the fifth by the unanimous voice of these four. These commissioners were to decide the amount of losses and damages actually suffered by British subjects by lawful impediments since the Peace, whereby the British subjects being creditors of citizens or inhabitants of the United States, could not by ordinary course of justice obtain full and adequate compensation. The commissioners were given power to ex-

amine on oath or affirmation; in short, the general powers of a court; and the award of any three was made final—the United States agreeing to pay the amount which might be awarded.

Difficulties arose in the execution of this Article, and on January 2, 1802, a new Treaty was concluded, by which His Majesty agreed to accept £600,000 Sterling, payable by three annual instalments of £200,000 each, in full of these claims.

So, too, citizens of the United States had complained of irregular capture and condemnations of their ships. A board of five commissioners, appointed in “exactly the manner directed with respect to those mentioned in the preceding Article,” was provided for by Article VII—the award of any three was made final—and Britain agreed to pay the amount determined. Commissioners were duly appointed, and they are referred to in the Treaty of January 8, 1802, in Article III.

It is, I think, perfectly plain that already both countries fully recognized the value of the judicial determination of international disputes even then.

But the fighting blood still coursed the veins of both peoples—the *argumentum ad baculum* was appealed to again. A still more inexcusable war even than that of forty years before—if such a thing is possible—broke out. Canada was again invaded, this time in the west as well as in the east. Upper Canada was in great part populated by the United Empire Loyalists and their descendants. The United Empire Loyalists had left their native land rather than change their flag and their allegiance, and in many instances had lost all they had. Although by Article V of the Treaty of Peace

it had been agreed that Congress should earnestly recommend it to the legislatures of the respective States to provide for the restitution of all confiscated estates belonging to British subjects, and should also earnestly recommend to the legislatures a reconsideration of all statutes in the premises, so as to make them consistent not only with justice and equity, but also the spirit of conciliation which should in the return of the blessings of peace universally prevail, few of the despoiled Loyalists received much benefit from the recommendation—on one pretext or another they were left without compensation for their confiscated property. The mother country came to the rescue and paid some of them a part of what they should have received from their former neighbors.

It was no wonder then that the bitterest feeling existed against the nation to the South on the part of these martyrs for principle and their descendants. Not only did they consider the invaders disloyal and rebels against their legitimate Sovereign, but also guilty of the meanest kind of fraud—embezzling by process of law.

But at length, this armed conflict came to an end, and again there was peace. On December 24, 1814, at the end of the war, a new Treaty, the Treaty of Ghent, was entered into; and common sense again prevailed.

In the Treaty of Peace of 1783 the boundary between the two countries had been fixed in such a way that it was doubtful whether the Grand Manan and the islands in the Bay of Passamaquoddy, belonged to the one country or the other. Accordingly in the Treaty of Ghent, Article IV made provision for refer-

ence to two commissioners to examine and decide upon the several claims, one to be appointed by the King and the other by the President. If these should not agree, it was provided that it should be referred to some friendly Sovereign or State, each contracting party agreeing to consider the decision of such friendly Sovereign or State final and conclusive.

The two commissioners appointed under this Treaty, in 1817, November 24, gave a decision awarding three islands in the Bay of Passamaquoddy to the United States and the rest of the islands in that bay as well as the Grand Manan to Britain, i. e. Nova Scotia.

It was stated in this award that, "It became necessary that each commissioner should yield a part of his individual opinion."

Precisely similar provisions were made by Article V of the Treaty of Ghent for the determination of boundaries at other points (the North of Maine) as were made in Article IV for the islands, and by Article VI for the boundary at the Iroquois River and Lakes Ontario, Erie and Huron, and the determination of the ownership of the islands.

The commissioners under Article V of the Treaty of Ghent were to cause the boundary from the source of the River St. Croix to the River Iroquois or Cataragui to be surveyed and they were to make a map of the boundary determined by them. The commissioners appointed had elaborate, voluminous and complicated reports made, with surveys, etc., but failed to agree. Accordingly September 29th, 1837, a convention was entered into to refer the matter to some

friendly Sovereign or State; but the award, rendered by the arbitrator, the King of the Netherlands (1831) was satisfactory to neither party and was set aside by mutual waiver. The dispute was finally settled by the Ashburton-Webster Treaty (1842.)

The commissioners under Article VI of the Treaty of Ghent, Messrs. Porter and Barclay, gave a decision at Utica, N. Y., June 18, 1822, which was accompanied by a series of maps; and the line so decided by them has been ever since respected.

During the War of 1812 much damage had been done by armed vessels upon the Great Lakes. The Treaty of Ghent did not provide that such armed forces should not be kept up; but it became apparent to both sides that it would be well strictly to limit the number and quality of armed vessels upon the fresh waters between the two countries. After some negotiation notes were interchanged April 28 and 29, 1817, containing the "Rush-Bagot convention," which notes contained an agreement by one and the other party limiting the naval force to be kept on the lakes to a very few: on Lake Ontario one vessel, on the Upper Lakes two vessels, on Lake Champlain one vessel, none of the vessels to exceed one hundred tons burthen, and each to have but one cannon of 18 pounds. It was agreed to dismantle forthwith all other armed vessels on the Lakes, and that no other vessels of war should be there built or armed; six months' notice to be given by either party of desire of annulling the stipulation.

The arrangement was after some delay submitted by the President to the Senate, and that body in 1818 approved of and consented to it.

Differences had arisen in the meantime as to the true meaning of Article I of the Treaty of Ghent, which had provided for the immediate restoration of all possessions taken by either party from the other during the war. The United States claimed the restitution of or full compensation for the slaves in any territory which was to be restored to the United States under the treaty but was still occupied by the British Forces, whether the slaves were on shore or on board any British vessel in the territory of the United States. Britain had disputed this claim.

By a convention concluded at London, October 20, 1818, it was by Article V provided that the determination of this difference should be referred to some friendly Sovereign or State to be named for that purpose, and each of the contracting parties engaged to accept such decision as final and conclusive.

The Emperor of Russia was named. He gave his decision that the United States were entitled to compensation for all slaves carried away by the British forces on leaving the territories which were to be restored, and all slaves transferred to British vessels within these territories (provided such slaves were from the territories), but not for slaves carried away from territories not to be restored to the United States.

Rights given by Article I of the Treaty of 1818 to the inhabitants of the United States to fish became the subject of much controversy, very unpleasant and even dangerous in its character. The troubles were at length put an end to in 1910 by an arbitration by the Hague Permanent Court. This will be spoken of later.

To carry out and make effective the decision of the Emperor of Russia, a convention was concluded July

22, 1822, under the mediation of the Emperor of Russia, whereby (Article I) one commissioner and one arbitrator were to be appointed by the President, and one commissioner and one arbitrator by the King, who were to constitute a board to determine (if the governments had not in the meantime agreed) the true value of slaves at the time of the exchange of the ratification of the Treaty of Ghent and so fix an average value; if the majority should not agree the Russian minister or agent at Washington was to determine the average value.

Article II provided that, the average value being found, the two commissioners were to form a board to determine the number of slaves to be paid for, and they were given powers of examining under oath, etc. If they did not agree on any point, the name of one of the arbitrators was to be drawn by lot, and that arbitrator became the third member of the board, the decision of the majority to be final.

Difficulties arose in the execution of this convention, and ultimately November 13, 1826, the two countries agreed that \$1,204,960 should be paid and accepted in full, and the commission was dissolved.

Claims continued to be made by the citizens of each country against the other and another convention became necessary. This was concluded February 8, 1853, and provided (Article I) for the reference to two commissioners, one to be named by the Queen and the other by the President, of all claims presented against either government by citizens of the other country. The commissioners were to name a third person to act as arbitrator or umpire in any case in which they should differ in opinion. If they could not

agree upon the umpire, each was to name one and the choice between the two so named was to be made by lot. The time for making the award was July 17, 1854, extended to January 15, 1855.

The commissioners selected as umpire Mr. Joshua Bates, who resided in England, but was an American. They awarded damages in about thirty claims; and the whole proceedings of the board were completely satisfactory to both countries.

June 5, 1854, a new Treaty was entered into—the Reciprocity Treaty—which, by Article I, provided for the appointment by each party of a commissioner. These were to choose or select by lot a third person as arbitrator or umpire, if necessary. The commissioners were to examine the coasts of the British Provinces and the United States, and designate the places reserved exclusively for British fishermen and excluded from the common liberty of fishing given by the convention of October 20, 1818, and the Treaty we are now considering.

I pass over the Treaty for the Suppression of the African Slave Trade, April 7, 1862, and the mixed court provided for by that Treaty to pass upon claims for arbitrary and illegal detention of vessels by the ships of either navy.

An additional convention was concluded June 3, 1870, whereby these courts were abolished for any future business, and their jurisdiction lodged in the courts of the two countries.

By a Treaty of July 1, 1863 (Article I) commissioners were to be appointed, one by each government, they to select an arbitrator or umpire. If they could not agree the King of Italy was to be appointed. They

were to pass upon the money compensation to be paid to the Hudson's Bay Company and the Puget's Sound Agricultural Company in respect of rights and claims in Oregon and Washington Territories. The commissioners, A. S. Johnson and John Rose, made their award September 10, 1869, allowing \$450,000 to the Hudson's Bay Company and \$200,000 to the Puget's Sound Agricultural Company.

Then came the very important Treaty of Washington May 8, 1871—important *inter alia* from the fact that for the first time one of the plenipotentiaries was from Canada, namely, the Prime Minister of Canada—and still more so from the fact that the provisions as to the rights given to citizens of the United States of coast fishing and through bonding were not to come into force until legislation had been passed to that intent by the Parliament of Canada and the Legislature of Prince Edward Island (then still a separate Province and not as yet a part of the Dominion of Canada.) There was a long and acrimonious debate in the Parliament of Canada over the proposed legislation, but at length the Act was passed, June 14, 1872, 35 Vic. (Dom.) C. 2.

The importance to be attached to these facts is, I think, obvious. It is true that Canada was not recognized as a nation with power to make her own treaties, but the mother land acknowledged her very great interest in the matters to be considered by appointing her Prime Minister one of the Imperial Plenipotentiaries. Further than that the home authorities recognized that she was "mistress in her own house," and that her own Parliament should determine what was best for her. This was a kind of official recognition

of the real position of Canada, concealed as it was by official and traditional terminology.

Article I provides for the disposal of the "Alabama Claims" by "Tribunal" of five arbitrators, one named by each of the two governments, parties to the dispute, one by the King of Italy, one by the Emperor of Brazil and one by the President of the Swiss Republic. They were to meet in Geneva. They did so, and their award is too well known to require further statement.

By Article XII an agreement was made to submit to three commissioners all claims of citizens of the United States other than those arising from the acts of ships allowed by Britain to escape from her ports and similar claims by British subjects against the United States. One commissioner was to be appointed by each contracting party and if the parties could not agree upon the third, the Spanish Representative at Washington was to name him. This board sat at Washington. The claims on the part of the United States arose from the St. Alban's Raid, and other alleged wrongs. The total number of cases filed on both sides was nearly 500 and the decisions were in most instances unanimous.

Article XXII provided for three commissioners to determine the amount of compensation to be paid by the Government of the United States to the British Government for the privileges given the citizens of the United States of sea coast fishing. Each party was to appoint one, the two governments jointly the third and if they could not agree on the umpire, the Austrian representative at London was to nominate him. This was the well-known Halifax Arbitration.

Article XXXIV is another provision which requires notice. The Treaty of June 15, 1846, made the international boundary at the far West, "The middle of the channel which separates the Continent from Vancouver Island." The commissioners appointed to determine the boundary differed as to the position of this channel. It was agreed by Article XXXIV to leave the determination of this controversy to the Emperor of Germany. The Emperor (October 21, 1872) decided in favor of the American contention; and we lost a large island which we had thought was ours. In 1873, March 10, the commissioners, Hamilton Fish, Sir Edward Thornton and James C. Prevost, made a final disposition of the whole boundary under the Treaty of 1842.

Seal fishery gave rise to a good deal of trouble, and after considerable negotiation and a *modus vivendi*, a Treaty was signed at Washington, February 29, 1892, which provided for the determination of the matters in controversy by a tribunal of seven arbitrators, two to be named by each of the two powers to the treaty, one each by the King of Sweden and Norway, the King of Italy and the President of France. The agent of Britain was the Canadian Minister of Marine and Fisheries, and one of the counsel was a leader of the Toronto bar, while one of the arbitrators was the Canadian Minister of Justice, afterward Prime Minister of Canada. The award was made August 15, 1893, and not long afterward the United States paid \$425,000 in full of all claims by British subjects. The matters at issue involved the exclusive rights in the seal fisheries in Bering's Sea, and the jurisdiction of the United States over its waters. The dispute was full of potentialities for war and at any time an inju-

ditional act on the part of officers distant from and without communication with their government might have had disastrous results.

Troubles had also arisen in reference to the boundary line between Canada and Seward's purchase from Russia, Alaska. On July 22, 1892, a convention was concluded for joint surveys; but still there were difficulties which could not be solved by surveyors. After much negotiation a convention was concluded January 24, 1903, whereby the determination of the boundary line was referred to a tribunal of six impartial jurists of repute, three to be named by each contracting party.

Three Americans of eminence were appointed by the United States and the British Government appointed the Lord Chief Justice of England and two Canadians, one of whom had been Chief Justice of Ontario and was a Justice of the Supreme Court of Canada, the other a Chief Justice of Quebec. Upon the death of Mr. Justice Armour, Mr. A. B. Aylesworth, K. C., of the Toronto bar, was appointed in his stead.

This Tribunal met in London in 1903 and their award is of too recent date to require explanation. It is to be noticed, however, that Canadian counsel sustained the burden of the labor of preparation and argument of the case.

On January 11, 1897, there was signed at Washington the Olney-Pauncefote Treaty, providing for the reference to three arbitrators of all claims or aggregates of claims not amounting to £100,000 and not involving territorial claims. These arbitrators were to be appointed one by each government and the two thus selected to nominate the third—all three to be jurists of repute. All claims or aggregates of claims exceed-

ing £10,000 and all other matters in difference under Treaty or otherwise, not including territorial claims, were agreed to be left to the board and if the board were unanimous, the award was to be final; if not, either party could have it reviewed by a tribunal of five jurists of repute, two appointed by each government and the fifth by these four, or, if they could not agree, then by the King of Sweden or Norway or some substitute selected by the contracting parties. This Treaty failed of ratification by the Senate.

In 1908, April 4, a general Treaty of Arbitration between the United States and Great Britain was signed at Washington. This provided (Article I) that differences which might arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties, and which could not be settled by diplomacy, should be referred to the permanent Court of Arbitration established at the Hague by the convention of July 29, 1899, provided they did not affect the vital interests, the independence or the honor of the two contracting States and did not concern the interests of third parties.

Article II provides that in each individual case the parties were to conclude a special agreement defining the matter in dispute, the scope of the powers of the arbitrators and the times to be set for the several stages of the procedure.

A provision of very great significance to a Canadian appears in the Treaty. The British Government reserved the right before concluding a special agreement in any matter affecting the interests of a self-governing Dominion of the British Empire to obtain the concurrence therein of the Government of that Dominion.

This was not indeed the first time the concurrence of the colony had been provided for; as we have seen that in the Treaty of Washington (1871) certain parts of the Treaty were not to come into force until legislation had been passed by the colonies concerned.

It was in conformity with the provisions of this Treaty that the special agreement was entered into, with the concurrence of the governments of Canada and Newfoundland, for submission to the Hague Permanent Court of Arbitration of questions relating to fisheries of the North Atlantic Coast. The questions arose under the convention of 1818 which gave (Article I) certain rights to the inhabitants of the United States to fish in British waters. This special agreement, signed at Washington January 27, 1909, confirmed by interchange of notes March 4, 1909, set out the matters in dispute and the contentions of either party.

The board appointed contained the Chief Justice of Canada and a Justice of the United States Circuit Court of Appeals, as well as an Austrian, a Dutchman and an Argentine. Canadian counsel again took part in the presentation of the case for Great Britain and assumed much of the burden of its preparation.

The result seems to have been satisfactory to both sides.

Now, while I do not say at all that I have made an accurate division of the various treaties, this, broadly, is the result: Of matters which were peculiarly pecuniary, there were five submitted. Two were wholly successful and three were not successful. Of matters which were not solely pecuniary, involving land or something of that kind, ten were submitted to commissioners, of which eight were wholly successful

and two not successful. There were four references to sovereigns, three of which were successful. Therefore, of the nineteen references, thirteen were wholly successful and only six have failed, which I venture to say is an admirable showing.

January 11, 1909, a Treaty—"Waterways Treaty"—was signed providing for the establishment and maintenance of an International Joint Commission of the United States and Canada—three appointed by each government—which commission should (Article VIII) have jurisdiction over and pass upon all cases involving the use, obstruction or diversion of the waters between the United States and Canada. But Article IX contains an agreement that all matters of difference between the countries involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other along the frontier shall be referred to this commission for inquiry and report. Article X provides that any questions or matters of difference involving the rights, obligations or interests of the United States or of Canada, either in relation to each other or to their respective inhabitants may be referred for decision to this International Joint Commission. If the commission be equally divided, an umpire is to be chosen in the manner provided by Act 45 of the Hague convention of October 18, 1907. This may be called a miniature Hague tribunal of our own just for us English-speaking nations of the Continent of North America.

Leaving aside questions of tariff, which are quite outside the subject of this paper, the international relations between the two countries are governed by the three agreements:

1. The Rush-Bagot arrangement.
2. The General Arbitration Treaty of 1908.
3. The Waterways Treaty of 1909.

The first of these has been strictly observed, except where the consent of Canada has been obtained to trifling variations from its terms—a variation more in the letter than in the spirit.

The understanding was, however, in great danger in 1864. The Minister of the United States in London was instructed in October of that year to give the six months' notice required to terminate the agreement; and Mr. Adams did so, with the subsequent approval of Congress. Before the lapse of the time specified, however, matters on the lakes had taken a different turn, and the United States expressed a desire that the arrangement should continue and be observed by both parties. This was acceded to and all parties thereafter considered the convention to be in full force.

In 1904 permission was given to the United States ship *Essex*, carrying fourteen guns, to pass through the St. Lawrence River and the Canadian Canals to the Great Lakes from the Atlantic. This was done on the assumption that the United States did not intend to depart from the convention, although I confess my inability to understand how this was logically consistent. But we are not a logical people.

The *Fern* was allowed to pass in the same way in 1905 through the canals, and she is still in the lakes. Her use is agreed to be confined to purposes of training.

In 1907 the State of Michigan asked for the loan from the United States of a ship. The *Don Juan d'Austria* was loaned; her guns and armament were

removed at Portsmouth for the voyage up, and though no pledge was given that they would not be replaced, the ship was, at the request of the United States, allowed to pass up the Canadian Canals.

In the same year the Sandoval, carrying a secondary battery of two guns, was upon a like request allowed to pass for the use of the New York Naval Militia. This permission is expressed to be "on the same conditions as those governing the similar cases of the United States vessels Hawk and Dorothea, i. e., that the said vessel shall pass through Canadian waters without armament and that her use will be confined to purposes of training.

In 1908 the U. S. S. Nashville received the like permission on the like terms.

The Navy Department of the United States claims that there is nothing in the way of treaty obligations to prevent the building of any kind of vessel on the Great Lakes, and there are a dozen shipyards with plant and organization sufficient to build hulls and machinery and to launch naval vessels of the maximum size that can be taken by the canal system.

Canada has no such ships as those which I have mentioned; and it cannot be denied that sometimes there are anxious thoughts entertained arising from the maintenance on the lakes of these ships, though only for training purposes. The garrison at Toronto is maintained chiefly for training purposes for our militia; but it would be just as efficient were war to be declared as though it were not used for training purposes. But when all is said and done, most Canadians realize that the United States is a friendly nation; and, even with the variations allowed, the arrange-

ment has been of enormous advantage to all concerned, of disadvantage to none.

It may be well for the United States to consider whether it is not unwise to ask that the letter of the agreement should be departed from. Canada would be considered ungracious were she to refuse to consent to other ships being allowed to pass up the canals for use on the lakes. It would look as though she feared a hostile movement on the part of her neighbor; that she doubted the good faith and real desire for permanent peace of her elder sister to the South. But both parties thought that the agreement was one that should be made and when made should be observed; and it is rather hard to see how the convenience of one party should lead to its being departed from. National susceptibilities are to be considered, however absurd they may be and whether they are absurd or not.

The Treaty of 1908, already referred to, provides that differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the convention of July 29, 1899, provided nevertheless that the differences do not affect the vital interests, the independence or the honor of the two contracting States, and do not concern the interests of third parties.

The Treaty of 1909 was preceded by the constitution of a board of commissioners. Such a board was formed at the request of the President, acting under the authority of the River and Harbor Act approved June 13, 1902. The functions of the proposed board

were defined in the Act and were substantially a full investigation of the question of the boundary waters; and the board was to consist of six members, three appointed by the United States and three by Canada. The President, July 15, 1902, communicated through the American Ambassador at London with the British Government, that government transmitted the invitation to the government at Ottawa, the Canadian Government accepted the invitation, and this acceptance was communicated to the American Government. The American part of the board was appointed in 1903 and the Canadian in 1903 and 1905; and work was begun with all convenient speed on the Sault Ste Marie Channel, the Chicago Canal, the Minnesota Canal, etc. This board has done an immense amount of very valuable work already.

The Treaty of 1909 was really at the instance of that board. It provides for an International Joint Commission, three appointed by the United States, three by Canada; and the value of the work which may be done by this new commission is incalculable.

Every dispute involving the rights, obligations or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants may be referred to the commission by the consent of the two countries.

It is hard to see how a more comprehensive clause could be framed; and if the Treaty had provided that such dispute "shall" be referred, the work would be perfect. As it is, the Dominion must give consent through the Dominion Cabinet. That is an easy task. We have a government which is united—it must be united or it could not stand—and which in this instance

does not need to go to Parliament for authority. But in the United States the action must be by and with the advice and consent of the Senate; and sometimes it is said trouble arises in the Senate about confirming treaties.

Each reference to the commission will or may be but equivalent to making a new treaty. Had the provision been that the consent should be given by the President of the United States, the position of the consenting parties on the two sides would have been much alike.

Better even than this would be a provision making the arbitration of the commission apply automatically. If such a provision proved unsatisfactory, the treaty could be denounced and a new treaty negotiated. But I suppose there may be some jealousy on the part of the Senate, or perhaps the Constitution prevents. And we Canadians notice that your Constitution prevents a great many things over which we have no trouble at all.

Now arbitration has on the whole worked satisfactorily. The worst result by arbitration is enormously better than the best obtained by war. Of course it is the inalienable right of every litigant freeman, in case he does not succeed, to say things about the judge. And no doubt the judge has been damned most energetically in many instances. That is human nature. One of your humorists has said "There is a great deal of human nature in man." That is true, and neither American or Canadian has got rid of its frailties. "*Naturam expellas furca tamen usque recurret.*"

Indeed the very negotiating of his treaty, which is perhaps his proudest memorial, ruined Jay politically

and cost him the Presidency. Republics are proverbially ungrateful. The Republic failed at the time to appreciate the value of the Chief Justice's services; but posterity has done him justice and he is recognized by all as one of the ablest, noblest and most patriotic men of his own and all time.

We Canadians have always thought Lord Ashburton gave away a large amount of territory to Maine which rightfully belonged to Canada; but this was not the act of an arbitrator or referee. When the German Emperor took from us the Island of Juan de Fuca, we said things about the Judge, but not much; and all irritation on the northwest corner of the United States has long passed away. The Alabama award did not much concern us, and when the Halifax award was made it was the turn of the United States to damn the judge; and no one can say that the opportunity was not fully utilized. But you paid up—with a wry face and after long delay, it is true—but you paid up.

The Paris arbitration was, I think, fairly satisfactory to both sides; and except with a few fire-eaters on both sides of the line, and the politicians who made use of it in the endeavor to dish their opponents, there was no public objection.

The case was different in the Alaska arbitration. Canadians almost to a man believed that Canada did not get justice. Even before the arbitrators sat, there were statements made that some or one of the American arbitrators had expressed a fixed determination not to give way, no matter what the evidence. It was felt that the decision was not a judicial decision on the merits, but that the result was based upon diplomatic grounds. Our people were not so angry at the de-

cision itself; but they thought fair play had not been shown. All this may, of course, be quite without foundation or justification; and certainly little, if any, reference is now made to the matter among us. In any event, most of the anger was vented upon the head of Lord Alverstone; and I presume he did not feel it much.

But once again I say, the worst result (consistent with honor) by arbitration is enormously better than the best by war. * * * Man is a social animal, and so soon as, in the course of evolution, he became such, it was imperative that his conduct should be restrained by rule of some kind; in short, by law. Obedience to law must needs be considered right; disobedience wrong, a sin, for wrong and sin were at first all one.

If a man conceived his rights to have been trenched upon, only two courses were open. If the force of public opinion (and no civilized man can wholly appreciate the tremendous power of public opinion in a primitive community) should not prove effective to restore him to his rights or to bring about adequate compensation, he might be obliged to avenge his wrongs, if he could, by his own strong right hand. This is anarchy.

The other method is the submission of the determination and enforcement of rights to some tribunal; and that tribunal, under whatever name it may be known, is in substance a court.

A court is organized and sustained to enforce the law. The law is composed of such rules of conduct as the community think it worth while to endeavor to

compel obedience to; whether these rules of conduct come down from the forefathers or are laid down by contemporary authority. The law is made effective by various sanctions, so that the violator shall pay in "meal or malt," in person or pocket.

The course of evolution has been gradually to eliminate from the determination of disputes the power of the disputants, their physical prowess, and finally their influence and social standing. Ultimately, in all free countries, all men are free and equal before the law; no longer is the wager of battle allowed, and no baron can now overawe the court. So all civilized societies have long had courts to declare and insure his rights for everybody.

But while the State considered it wholly necessary that disputes between citizens should be decided by some judicial tribunal and not by the strong hand, the same principle has not been fully adopted in cases of disputes between nations. International law has laid down rules indeed, but these rules might be disregarded at will; the only penalty being the unfavorable public opinion of the world. This public opinion never had the force of the public opinion of a primitive community.

Whether by evolution upward or devolution downward, I shall leave to theologians and scientists to determine, when man first appeared as man he was little removed from the brute. When anyone differed from him, his only means of argument was the means of argument provided for the brute, from whom he was little differentiated; the argument of force, improved by the use of a weapon, a club. So the only way to determine the right of man or woman was

through the use of brute force, and this was extended to the case of the rights of family, sept, clan, city, nation. The God of Battles was the final arbiter, and man believed, as nine out of ten unenlightened men still believe, that war was a necessity. True, in disputes within the bosom of a nation, means have been found to dispose of controversy without a physical encounter; the exertions of counsel take the place of the exertions of litigant or champion; but between nations the case is different. * * * The Supreme Court of the United States has been for more than one hundred years dealing with disputes between sovereign States; the Supreme Court of Canada and the Judicial Committee of the Privy Council at Westminster for a shorter period. These States are not indeed sovereign in the sense that they can declare war against each other; nor, what is equally war of a kind, can they levy imposts upon interstate commerce. But in many a case these courts have determined matters of as great importance as are usually determined by war. It is not necessary in this place to mention any of the decisions of your Supreme Court. It may be of interest, however, to mention one in Canada.

In 1876 the Dominion of Canada by statute (39 Vic. C. 21) set apart and formed a new territory, Keewatin, beginning at the western boundary of Ontario and extending west to the eastern boundary of Manitoba; and placed this new territory under the jurisdiction of the Parliament of Manitoba. Unfortunately, the westerly boundary of the Province of Ontario was a matter of dispute, the Dominion claiming that the line was much further east than the Province put it. At

once there arose a dispute between the Province of Manitoba and the Province of Ontario; and actually each province, Ontario and Manitoba, had an armed force in the disputed territory, and it looked as though two armies, each commanded by officers bearing the patent and warrant of the same Queen, would come to open war in that territory. Better counsels prevailed, however. Arbitration failed, and it was ultimately left to the Judicial Committee of the Privy Council, the highest court of appeal in the British Empire. That is an instance of a British court dealing with a matter of territory.

Why cannot, then, practically all disputes between nations be determined in the same way by a judicial body? Of course, there are, or rather may be, questions affecting the honor of a State. No man and no State can, it is supposed, allow another to judge of his or its honor. Now, I do not suggest that there should be an international court to decide whether a nation must fight in order to be considered honorable, as in the German army there are courts of honor to decide whether a man shall fight; but in most instances, if not in all, there is doubt of the facts, and the facts being determined, there is seldom any difficulty in deciding whether a nation should fight. Why should not the facts be determined by an impartial tribunal?

We have a law in Canada that employees must not strike or employers lock out, unless and until an arbitration has been had into the merits of the controversy. After the arbitration, the men or the masters may decline to accept the award, and strike or lock out. But the arbitration brings out the facts; and the

instance is rare in which an award is not accepted, with modifications, it may be, agreed upon by both parties.

If nations would submit the facts to an impartial tribunal, the occasions for war would be reduced indefinitely.

The independence of a State, of course, cannot be arbitrated upon; but a war to destroy independence is in this age absolutely unthinkable.

The main objection to a general and absolute treaty of arbitration lies in the want of an authoritative code of laws governing States, as the municipal laws of a State govern its citizens. That objection is rapidly disappearing. Through the labors of international lawyers, a fair body of international law has already been elaborated, which has received the implied assent of civilized powers. Would it be too much to hope that the Hague Conference or the Permanent Court of Arbitration may be able to draw up a complete code of law by which all nations would consent to be bound? Or is it too much to hope that the body of gentlemen who have been appointed by my friend Mr. Carnegie recently—I dare to call him my friend Mr. Carnegie, because, although I never shook him by the hand until tonight, I insist upon being allowed to call every friend of peace, my friend—is it too much to ask of these gentlemen, who are envied by every judge in the land, that they shall have a code of international law drawn up, which will be binding—for it would be binding—upon the nations?

A beginning was made in this direction in the Washington Treaty of 1871, in which the contracting parties agreed, by Article VI, upon the duties of a neutral

government so far as it was necessary for the purposes of the arbitration at Geneva. It might well be that the most carefully drawn code would be found not to cover certain matters. The *casus omissus* is always coming up in ordinary litigation. What harm could result from allowing the board to supply any *casus omissus*?

Now, Mr. President, ladies and gentlemen, before I sit down I wish to say one thing more.

It may be a mere coincidence—if so, it is a happy coincidence—that the last letter I received before leaving Toronto to attend this meeting was from the president and secretary of the Centenary Celebration Association which has been formed in the Province of Ontario, urging me most earnestly to attend a meeting of that organization. Here, amongst other things, is what they say:

“The promoters of this centenary celebration heartily approve of the movement which has been started for an international celebration in 1914 or 1915, of the century of peace, but they hope that it will not be confined to Canada or the British Empire and the United States. The War of 1812 arose out of the Napoleonic struggle”—

That, perhaps, is not a correct historical statement, but we will pass that—

“and both wars came to an end in the same year. There has been a century of Anglo-French as well as American peace, and the present entente-cordiale between Great Britain and France amounts to a practical alliance for the maintenance of international stability and general peace.

“Besides, France is one of the mother countries of the Canadian people, and her millions of Canadian

descendants will more heartily join in the celebration if she takes part.

"We venture to hope, too, that so far as the United States is concerned, the celebration will consist of more than neighborly courtesies and compliments and the erection of monuments of peace. It should include something definite and practical for the purpose of securing future centuries of peace between the two countries—something that will amount to a final recognition on the part of the United States of Canada's rights to work out her own destiny on this continent as one of the great national units in the empire of nations under the British Crown. The best evidence of peaceful intentions would probably be a new treaty perpetuating as nearly as possible the terms of the Rush-Bagot convention (now terminable on six months' notice) prohibiting armaments upon the Great Lakes, such armaments being useless to the United States against any other nation but Canada."

My friends, we have got far away from the club law in most instances. Is it too much to expect that the two great English-speaking nations, composed largely of the same race and having in general the same descent, speaking the same tongue, worshipping the same God under the same forms, having practically the same institutions and having the same great aims and interests—is it too much to expect that these two nations will set the example to the world of the total abolition of this fiendish club law in international matters as well? God speed the day.

At a Peace Meeting held at the Johns Hopkins University January 6, 1910, the following resolutions were adopted:

Whereas, In the opinion of this meeting, the reduction of armaments and the cause of peace generally can in no other way be so effectively promoted as by the establishment of a permanent international court of justice, be it

Resolved, That the meeting expresses its hearty appreciation of the efforts being made by the President of the United States and by the State Department to establish such a tribunal in the form of the Court of Arbitral Justice, which was accepted in principle by the Second Hague Conference.

Whereas, In the opinion of this meeting, Maryland should lend her aid actively to the cause of peace and should at least be abreast of her sister States in this respect, be it

Resolved, That we hereby form a society, to be known as the Maryland Peace Society, and that the Chair be empowered to appoint a committee of five on organization.

In obedience to the will of the meeting, as expressed by resolution, there has been organized the Maryland Peace Society, of which you are invited to become a member.

The machinery set up in recent years for the settlement of international disputes by methods other than war, together with the actual results reached by such methods, have put upon the peace movement a practical character which it did not have a few years ago. The steps now being taken to carry out the recommendation of the Second Hague Conference relative to the establishment of a Court of Arbitral Justice are likely to result in adding to the existing machinery of peace one more institution of the greatest value to the cause of peace. In the opinion of many men it is the most important step in this direction that has thus far been taken. All the leading nations feel the burden of armaments. Nearly three-quarters of the annual revenue of the United States is expended in the maintenance of the Army and the Navy and in the payment of pensions, our legacy of past wars. An international court of justice to which disputes may be submitted before they reach an acute stage offers a workable substitute for war, and in course of time, will make it

possible to enter upon the movement for disarmament with some prospect of success.

The several forms of membership in the Maryland Peace Society are: Annual Membership, one dollar a year; Sustaining Membership, ten dollars a year; Life Membership, fifty dollars.

In addition to the literature which the Maryland Peace Society supplies, the Society holds meetings at various places in the City of Baltimore and State of Maryland at which the practicability of the cause today is shown.

Dues may be sent to Richard J. White, Treasurer, 10 South Street, Baltimore, U. S. A.

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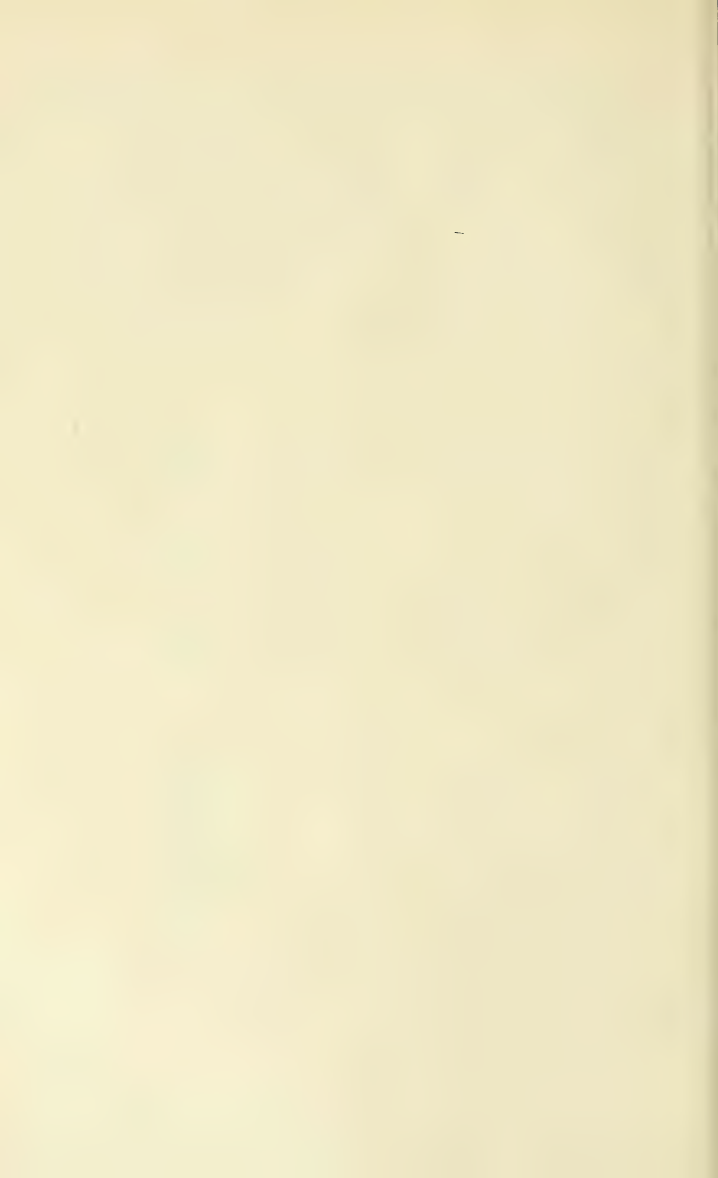
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**PUBLICATIONS OF THE
MARYLAND PEACE SOCIETY**

1. Judicial Proceedings as a Substitute for War or International Self Redress, by James Brown Scott. February, 1910.

2. America and the Hague Conferences, by William I. Hull. May, 1910.

3. War and Its Remedy, by Richard Bartholdt. August, 1910.

4. The Peace Move Practical, by Theodore Marburg. November, 1910.

5. The International Relations Between the United States and Canada—an Historical Sketch, by William Renwick Riddell. February, 1911.

The Third National Peace Congress will be held in Baltimore. McCoy Hall, Johns Hopkins University, May 3-5, 1911, under the joint auspices of all the leading societies in America devoted to the cause of the settlement of international disputes by means other than war. Noted men from all parts of the country will take part in the congress.

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NOVEMBER, 1912

BULLETIN
OF
LAFAYETTE COLLEGE

FOUNDERS' DAY

PUBLISHED QUARTERLY BY LAFAYETTE COLLEGE

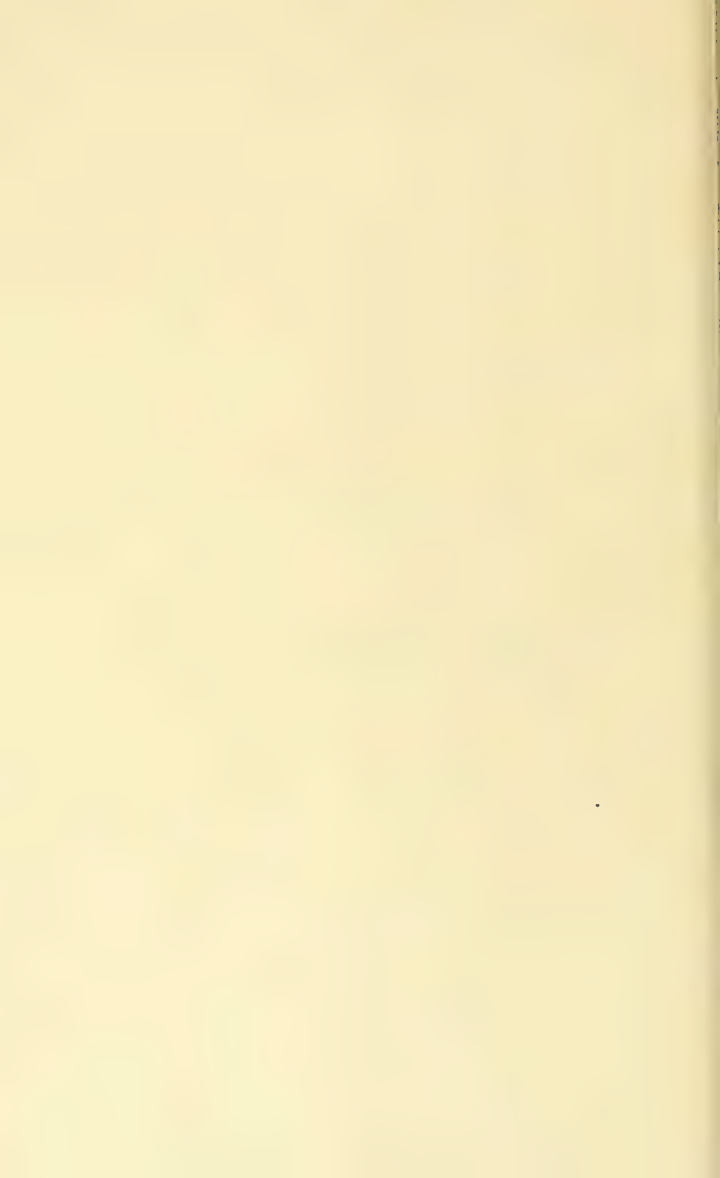
Entered as second-class matter November 20, 1906, at Easton, Pennsylvania,
under the Act of Congress of July 16, 1894

BULLETIN
OF
LAFAYETTE COLLEGE

ADDRESS
OF
HONOURABLE WILLIAM RENWICK RIDDELL,
L.H.D., LL.D.

DELIVERED AT LAFAYETTE COLLEGE

ON
FOUNDERS' DAY, OCTOBER 16, 1912



THE CENTURY OF PEACE

An Address delivered by The Honourable William Renwick Riddell,
L.H.D., LL.D., at Lafayette College, Easton, Pennsylv-
ania, on Founders' Day, October 16th, 1912.

I am come to you of the greatest Republic the world has ever seen, from one of the nations composing its greatest Empire—and I intend for a short time to speak to you of the international relations between Republic and Empire, and especially of the long period of peace.

And this is the time peculiarly fit for speaking of that peace, for just one hundred years ago on the 18th of June was made the last declaration of war between these two peoples—almost to a day, a century ago, was the first real battle of that war fought at Queenston Heights.

True it is that before that time, Michillimackinac had been taken, Hull had invaded Upper Canada and, retreating to Detroit, had capitulated to Brock with his whole army; but these had been but minor operations and skirmishes; and it was not till the 13th of October, 1812, that what could be called a battle took place between the separated brother nations.

I am not, however, to speak of deeds on the tented field and of horrid war but of peace—the last act in Canada of that fratricidal war was the raid of the Kentucky Mounted Riflemen from Detroit in November, 1814: repulsed at the crossing of the Grand River, they retreated,

plundering as they went, and left Canadian soil forever.

The treaty of Ghent was signed on the twenty-fourth of December, 1814; and the attack on New Orleans took place on the eighth of the following January—in ignorance of the Peace.

Since that time the two peoples have not washed their hands in each other's blood, but have lived in peace if not always in harmony.

But it was not the treaty of Ghent which was the beginning of peace—the foundations of that peace had been laid broad and deep many long years before, and the Peace is but part of the wondrous fifth Act in the history of a people.

In 1752 Bishop Berkeley sang:

“Westward the course of Empire takes its way,

The first four acts already past

A fifth shall close the Drama with the day,

Time's noblest offspring is his last.”

That fair Island in the Northern sea lay invitingly open to the West of the haunts of Jute, Angle and Saxon, who were of that imperial and imperious race in Central Europe which had never bowed the knee to conquering Rome—a very different race from the older inhabitants of England—with all the virtues and the vices of a far more barbarous state, they killed instead of enslaving their enemies and scorned intermarriage with the alien, as some of their descendants in America do today. Less clever than the Celt, as the Englishman is to this day less clever than the Irishman or the Welshman, they were brave with a valour never excelled and seldom equaled.

Living in the peninsula of Denmark, the low-lying lands bordering the banks of the Elbe and the islands which stud that part of the Baltic Sea, they had, says Tacitus, "Stern blue eyes, ruddy hair, their bodies large and robust, but powerful only in sudden efforts." Hemmed in by the legions of Rome to the South, seeing no land to the North which was to be desired, scorn- ing to retrace their steps to the East, they sailed for the beautiful isle but a short distance away toward the setting sun; and this was the first Scene in the first Act of the splendid drama of Anglo-Saxon history. I know the word Anglo-Saxon is ill-chosen, but I do not know a better. I must not say English, because many will remind me that no small or unimportant part of those called Anglo-Saxon come from north of the Tweed—nor may I say British, for west of St. George's Channel lies the Emerald Isle and she spurns the very name, "British." I use the term Anglo-Saxon, wholly inappropriate as it is and insufficient, to denote those whose mother-tongue is English and those whose ideal of government and liberty corresponds with theirs.

Within the narrow bounds of England and southern Scotland, Angle and Saxon and Jute settled and labored and fought—fought with each other, every tribe and every clan full of that which is of the very genius of our race—determination to be self-governed. We refuse to be governed even by our brother, and we spurn the yoke of the stranger.

And their brother in blood—the Dane—came in, and they fought with each other till at length a semblance of peace came and England had become England with an

English language formed and in familiar use. But their determined particularism, individualism, would not down, and generation after generation of desperate fighting and terrible rapine had not taught them the necessity of obeying one central authority. There was also a division, not locally but in the very heart of the body politic, for half the people were villeins and no small number actual slaves. It is true that the condition of the villein was vastly different from that of the *servus*, but he fell short of all the rights and privileges of the free-born—and those above him looked upon him as not one of themselves.

Then came the second Act of the drama. William of Normandy led his hosts into England and conquered it for himself. He claimed not by free election as had the Saxon monarchs—although the form of election was gone through in his favor—but he claimed as the vicergerent of God and by force of arms. He came, a man of middle age with matured views and knowing his own mind. He did not even speak the tongue of his new subjects.

English rebellion and opposition were met with confiscation of English lands, and the Saxon land-owner was driven out, homeless, to mingle with the villein and the slave he had formerly despised. As time went by, the King's authority took almost wholly the place of the limited authority of the Saxon local dignitary—all England became the subject of the one man, and all Englishmen were made to feel that they were one. Under the successors of the conquering Norman, this process continued, and the King's court took the place of the County Courts, and the King was the fountain of justice as well

as of honor. The Norman at length became almost more of an Englishman than the Saxon—the language of the Conqueror was forgotten, and that of the conquered, purified and strengthened, became again the language of the whole Island.

But kingly power, as all power, tends to encroach upon freedom—the old theory that the King of England is chosen by his people to reign over them had become obsolete, and the Kings at length claimed their crown as of divine right—"the right divine to govern wrong" was claimed—not that divine right of Kings which is but the divine right of anyone who can get uppermost, as Herbert Spencer puts it, but a right given by the Almighty himself to a certain determinate man and a certain determinate family to govern irrespective of character and ability. This made itself most conspicuous in the Stewarts—a race of winning manner but dishonest, treacherous, ungrateful. It is one of the marvels of history that a family such as this should have called forth the warmest loyalty and undying devotion of so many intelligent and common-sense people—a loyalty and devotion which has never been surpassed, and equaled but seldom.

During this Act, too, a Scene of no small significance was presented. England had never submitted in any civil respect to a ruler who did not live in England, but a claim was made and persistently pressed by an ecclesiastical prince to govern her in many respects which nearly touched her well-being. I do not propose to say anything about the theological side of the controversy, but the Reformation was at least this, if nothing else—it was the absolute prohibition of all but an English authority to

rule in England in any temporal matter. Then came, in close succession, two Scenes of startling vigor; King Charles lost his head and his son lost his throne: and in this the third Act the Anglo-Saxon again said, and with effect, "I shall govern myself."

True the lesson had been learned, and well learned, that there must be one central authority in each nation—the villein and the slave had disappeared—but now it was necessary to show that that one central authority must commend itself to the people and that the people must be heard.

Constitutional liberty was accomplished—the greatest human blessing a virtuous man can possess—and this the glory of our race is the shining achievement in this the third Act.

America had been discovered and many had made their homes in this new land—the eyes of some who had the prophetic vision were turned toward the glowing West, but the home-keeping Englishman had not fully appreciated its significance. "Home-keeping youth have ever homely wits." But the Colonist knew and appreciated the importance of his new continent, and he determined that that continent should be English.

From 1613 when the Virginian, half-pirate, half-patriot (no uncommon mixture in any age of the world), drove out the French colony in Mt. Desert till 1759 when Wolfe planted the Red Cross banner upon the plains of Abraham, the English colonists kept up a constant warfare against the French to the North; and that not alone to prevent the French from annoying them but for themselves to possess the land—Canada—and thus came

about the first Scene of the fourth Act, and all North America then worth considering became English—no, British—for Scotland had joined her fortunes to England's half a century before.

The colonies had not been too busy to bethink themselves of their government or to insist from time to time upon the right to govern themselves, but the fear of invasion from French America had kept them from open rupture with the mother country. Now, however, all pressure was removed, fear of France had gone, and the Colonists determined to exercise their racial right. Those at home had not learned the lesson that "he who crosses the sea, does not change his soul"—that the Englishman in America was as tenacious as the Englishman in England of the right to govern himself—the inevitable conflict broke out and was terminated in the only way in which such a conflict could terminate: "Nothing is ever settled till it is settled right." Self-government was vindicated and the Colonies became the United States of America.

I have recently before another audience said:

"The embattled farmers of the American militia fought not alone for themselves and their children, but also for Canada and Australia and New Zealand and South Africa—nay, for England herself, and for all that has made England England, and the British Empire worth while. The lesson was learned by the Mother Country, once for all, that the colonies are not subject nations, but sister nations. And never since that time has a colony insisted upon aught that was ultimately denied her."

Let no man think, however, that liberty was not known before this continent was discovered and inhabited—

until this continent made a passion of liberty. Generation followed generation in the old land and the thought, the ideal of liberty was never absent from the mind of the Islander—he treasured that ideal as fondly as could any Continental. Let no man think that it was the levying of a tax, an impost, here and there, that was the cause of the American Revolution—this was made a pretext (I do not desire to speak discourteously or disrespectfully). Nor were the Fathers of the Revolution (*pace* the school histories), with one shining exception, greater, better or nobler than those who opposed them. The true cause was that the time had at length come when the American Englishman knew that he could stand alone, and he demanded his birthright of self-government. Let no man think, either, that this was a rebellion against England or the English people. The best of England sympathized with the American.¹ A half-crazed King, ill-trained, hearing ever the voice of a foolish mother, “George, be a King,” was able to find instruments among the aristocracy—the governing classes—to carry out his will, and Rebellion must needs follow.

It was that same aristocracy, that same governing class, which drove out of the North of Ireland the virile, hardy, determined people without whom this part of the continent would not so soon have blossomed as the rose, without whom this Hall of Learning would probably not have come into existence, without whom the American Revolution might have languished and failed.

¹ Wraxall tells us that nothing ever made King George III unpopular with the English people but his resistance to the claims of the Americans—and that as soon as peace was declared his popularity revived—and, as we know, it never afterwards suffered diminution.

Perhaps there never was an instance in history where punishment and humiliation followed so speedily and so surely upon the sin and wrong-doing.¹ * * * *

The Fathers of the American Revolution ardently desired that Canada might become part of the Union; had she been, in reality, English, I cannot but think she must have accepted the urgent invitation of the Thirteen Colonies, so urgent indeed, that Montreal was taken by force and Quebec assailed—a bold and brilliant scheme—but Montgomery fell and Canada remained British. I do not stay to ask why that was so.

Washington, first in peace as first in war, I am confident, foresaw the fifth Act, even while he was playing the fourth, for when the invasion of Canada failed and Lafayette's scheme of conquest by way of the Lakes had also met a deserved fate, he urged every objection and strained every nerve against Lafayette's new proposal; that is, that he should with troops from old France, conquer the new France for that land. Washington already felt that "blood is thicker than water" and that

¹ The determined attitude of the Scotch-Irish against British authority did not derive from any peculiarity in that people. The Irishman is no more likely than another to be "agin' the Gover'ment,"—the current gibe notwithstanding.

Compare the revolutionary feeling of those who had been driven out by tyranny with the feeling and sentiment of the Irishmen brought into Upper Canada in 1824-25 by Peter Robinson and settled in Peterborough. Receiving proper treatment, they were warmly attached to the government, and upon the outbreak of the Rebellion in 1837, they marched in the depth of a Canadian winter to Toronto, a distance of nearly one hundred miles, to support the administration—to the Lieutenant-Governor they said "that they felt grateful to the Government and had come to fight for the British Constitution." *O si sic omnes.*

As Sir John Robinson, Chief Justice of Upper Canada, well says: "It did honour to Ireland, and it showed that whatever may be the failings of the Irish, hatred to their sovereign and ingratitude to their Government are not among the number."

it would be infinitely better for the nascent Republic, the new Anglo-Saxon power, that she should have as masters of the neighboring land, people of her own race.

When peace was declared began the fifth Act in the Anglo-Saxon drama—and that is still being played, it is not finished.

Shall I briefly run over the principal Scenes in this Act? In 1794 the disputes between the two peoples in regard to their boundaries and also the amount to be paid to the citizens of the two countries for damage done were referred to arbitration, and since that time no less than eighteen matters have been referred to the adjudication of arbitrators or judges—matters involving land, money and national territory, questions of the most varied character; and most of these references have been successful.

The defeated party indeed sometimes grumbled—that is the inalienable privilege of a freeman. The litigant has the right when a case goes against him either of appealing, or of abusing the judge.

When we could not agree about the boundary between Maine and Canada, it was left to Commissioners, and when they could not agree it was left to the King of the Netherlands, and when his award was satisfactory to neither party, we settled it by negotiation—indeed we tried every course but war. The settlement by Lord Ashburton, it must be said, did not please our people; but there is and was no disposition to attempt to get out of it * * * So when the northwestern boundary was to be settled, war was terribly near; but again the common

sense of the Anglo-Saxon came into play. Until 1818 Britain claimed all the territory down to the Columbia River, which is, at its mouth, between 46° and 47° N.L., but the United States claimed up to the line $54^{\circ} 40'$. In that year an agreement was made for joint occupation for ten years; and both during this period and after it, efforts were made to settle the dispute—in 1827 the agreement for joint occupation being renewed indefinitely. The Democratic party in 1844 chose as the party slogan: "Fifty-four forty or fight." Polk was elected, but the United States got neither fifty-four forty nor fight. Pakenham, the British ambassador at Washington, heard that the salmon would not rise to the fly in the Columbia River, and access to that river thereupon became valueless in his eyes; the Americans found, as they thought, that the land north of the 49th parallel was practically worthless: and so the offer of Pakenham to draw the boundary line at the 49th parallel was accepted—land worth today billions was not then thought worth talking about.

But there was still a little chance to quarrel—the boundary at the Pacific was the middle of the channel between Vancouver Island and the Continent. There are three Channels and an island of some size between two of them. This had been occupied by our people. An American commander, Harvey, took possession of it. British men of war were sent out and it looked like war; but the two people simply could not fight, so they left the decision of the true boundary to the Emperor of Germany. He gave the Island to the United States—and the United States wishes that he had not.

The foolish attempt a hundred years ago of the United States to take Canada failed, as did the equally foolish attempt of Great Britain to conquer the United States—and thank God for both results.

We have an agreement that there shall be no armed ships in the international waters, and while there is no agreement to that effect, we have sense and good feeling enough to keep our long international boundary clear from fortification and armed force. Our disputes we have heretofore settled by diplomacy or arbitration; and war is unthinkable.

During this century of peace, we have settled, by peaceful means, what fish from Canadian waters the Americans can take and what amount they should pay for those they took without right; what seals the Canadians cannot take and what they should be paid for those they should have been permitted to take; what Britain should pay for allowing the Alabama to escape and for Canada allowing the St. Albans Raid (we have not yet successfully pressed a claim against the United States for permitting the two Fenian Raids into Canada). We have settled what the United States should pay for land in Oregon taken from the Hudson Bay Company and others, and how far Alaska may stretch its tail down the Pacific Coast, cutting off Canada from the ocean.

And all this without *war*. "WAR" is the true "short and ugly word"—war is the curse of the ages.

How, then, do we now stand? The Rush Bagot arrangement I have already spoken of; then we have the Waterways Treaty of 1909, which is specially for the United States and Canada. It provides "for the

establishment and maintenance of an International Joint Commission of the United States and Canada—three appointed by each government—which commission should (Article VIII) have jurisdiction over and pass upon all cases involving the use, obstruction or diversion of the waters between the United States and Canada. But Article IX contains an agreement that all matters of difference between the countries involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other along the frontier shall be referred to this commission for inquiry and report. Article X provides that any questions or matters of difference involving the rights, obligations or interests of the United States or of Canada, either in relation to each other or to their respective inhabitants may be referred for decision to this International Joint Commission. If the commission be equally divided, an umpire is to be chosen in the manner provided by Act 45 of the Hague convention of October 18, 1907. This may be called a miniature Hague tribunal of our own just for us English-speaking nations of the Continent of North America." It was thus I described it a year or so ago at Washington.

Then the broader more comprehensive treaty of 1908, affecting Britain at large and not Canada specially, "provides that differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the convention of July 29, 1899, provided nevertheless that the differences do not affect

the vital interests, the independence or the honor of the two contracting States, and do not concern the interests of third parties."

A still more comprehensive treaty has been negotiated; but as yet it hangs in the balance and it would be an impertinence for me to discuss it in this land.

But the other day a difference of opinion arose between the Government of Great Britain and that of the United States about the Panama Canal. Some harsh words were said by a section of the English press, but not nearly so harsh as those said by most respectable papers in the United States taking the same side. It would ill become me, your guest, to express here an opinion as to the merits of the controversy. What I do wish to say is that a matter which is of vastly more importance than many which have caused long and bloody wars has no more chance of bringing about such a terrible result than the canal itself has of destroying New York or Easton.

The feeling for war between the two branches of English-speaking peoples has become atrophied for want of use during a hundred years. The sentiment of solidarity is growing, a solidarity which has its roots in times long before the Angle and the Saxon saw England, a solidarity which grew with the race in the Island, which was strengthened by the Norman, felt itself under the Stewarts, but which received an apparently fatal wound when the Guelph resisted the demands of his American subject. Washington, indeed, never hated England, but many of his contemporaries and many of their descendants did—and the feeling is not wholly dead, even yet. For, as some in the more remote regions, it is said, still vote for

Jackson, so some have not yet learned or appreciated that Britain is not an enemy of the United States.

But you and we are one in everything but the accident of political allegiance—that separation is itself but of yesterday compared with the centuries of glorious and, on the whole, happy history we have in common—and that separation is but skin-deep when compared with our fundamental and essential unity.

When the peace is carried to its logical conclusion and when the English-speaking world has determined finally and irrevocably that there shall be no more war among and between the English-speaking, the end of war is in sight. Who so proud or so powerful as to refuse to follow that example? And not alone will blood cease to be shed—taxation must diminish; the poor, the common man will come into his own; he will have some part of his Heaven in this world. No longer will those who lead him in his aspirations but

“ * * * * * mark off so much air

And call it Heaven, place bliss and glory there,

Plant perfect homes in the unsubstantial sky,

And say what is not shall be by and by.”

He will not need to wait for the sky to have some chance of a perfect home—at least a home approaching perfection—but his life will be sweetened by enjoyment of all he earns by his toil. “The poor shall never cease out of the land, but rich and poor shall meet together, for the Lord is the maker of them all.”

This will be said to be but a dream—be that as it may, can there be any doubt that these peoples who are of the same origin, who speak the

same language and worship the same God under the same forms, whose ideals and aspirations are as alike as are their laws and customs, who have the same courage and the same inspiration from heroic deeds of heroic ancestors, that these peoples must forget the petty or even the great differences which have separated them in the past, and stand side by side for freedom and right?

The one century of peace among and between your people and mine—may it extend to a millennium: yea, *in æternum*. May it be but the harbinger of that era to which the prophet looked forward, that happy time when "they shall beat their swords into plowshares and their spears into pruning-hooks; and nation shall not lift up sword against nation, neither shall they learn war any more."

BOOK OF THE INAUGURATION



CONTENTS

	PAGE
CHRONICLE OF THE INSTALLATION	3
THE MORNING EXERCISES	7
ADDRESS ON BEHALF OF THE CORPORATION	8
LETTER OF APPOINTMENT	10
THE INDUCTION	13
THE INAUGURAL ADDRESS	15
ADDRESS OF THE CHANCELLOR EMERITUS	33
ADDRESS OF THE SENIOR DEAN	38
ADDRESS OF THE SENIOR CLASS ORATOR	39
ADDRESS OF THE SENIOR ALUMNUS	40
THE AFTERNOON EXERCISES	43
ADDRESS OF WELCOME TO THE DELEGATES	43
RESPONSE BY COMMISSIONER ANDREW S. DRAPER	43
RESPONSE BY HIS HONOR, WILLIAM J. GAYNOR, MAYOR	48
RESPONSE BY UNITED STATES SENATOR ELIHU ROOT	51
RESPONSE BY PRESIDENT HARRY PRATT JUDSON	54
RESPONSE BY PRESIDENT EDMUND JAMES JAMES	57
RESPONSE BY PRESIDENT MARY EMMA WOOLLEY	57
RESPONSE BY CHANCELLOR JAMES HAMPTON KIRKLAND	58
RESPONSE BY AMBASSADOR JAMES BRYCE	61
RESPONSE BY LORD RECTOR ANDREW CARNEGIE	64
RESPONSE BY JUSTICE WILLIAM RENWICK RIDDELL	68
THE INAUGURAL DINNER	73
LETTERS FROM PRESIDENT TAFT AND COMMISSIONER CLAXTON	74
RESPONSE BY CHANCELLOR ELMER E. BROWN	77
RESPONSE BY PROFESSOR PAUL H. HANUS OF HARVARD	78
RESPONSE BY PRESIDENT ARTHUR TWINING HADLEY OF YALE	85
RESPONSE BY PROFESSOR WILLIAM F. MAGIE OF PRINCETON	86
RESPONSE BY PRESIDENT NICHOLAS MURRAY BUTLER OF COLUMBIA	90
RESPONSE BY PRESIDENT JACOB GOULD SCHURMAN OF CORNELL	96
LIST OF DELEGATES	101
GENERAL INAUGURATION COMMITTEE	111
CHAIRMEN OF INAUGURATION COMMITTEES	112

BOOK OF THE INAUGURATION





ELMER ELLSWORTH BROWN, PH.D., LL.D.
Seventh Chancellor of the University

A BRIEF CHRONICLE OF THE INSTALLATION OF CHANCELLOR BROWN

BY THE OFFICIAL CHRONICLER, PROFESSOR E. G. SHULER, PH.D.

In recording the academic events of November 9th and 10th, 1911, the writer almost instinctively feels in himself the attitude of a Janus and of the Janus face: looking both backward and forward. It was not long after the generosity of the late John Stewart Kennedy had made University Heights, with its superb site, its noble library and its large hopes, free of debt that Chancellor H. M. MacCracken laid down his burden. This service was begun not many years after the half century milestone of New York University had been passed, and lasted in all a little more than a quarter-century. He came soon after the crisis of 1881; and after one decade of service, in 1894 he removed the College and the School of Applied Science to University Heights, being a pathfinder, nay a pathmaker, into the newer and stronger life of New York University. During the one year of Interregnum, 1910-1911, the current administration of the University's affairs was entrusted to the Syndic of the University, Dr. J. H. MacCracken, and that year of service was marked by the issuance of a report which exhibited with admirable lucidity the financial status of the corporation as well as the literary and professional productivity of the academic teachers during the preceding half decade.

In the latter part of April, 1911, the friends as well as the intraparietal workers of New York University heard with profound interest and steadily increasing acceptance that the Committee of the Corporation had chosen Dr. Elmer Ellsworth Brown, the United States Commissioner of Education at Washington, to be the seventh Chancellor of New York University. As a matter of historical truth, he might be called the second one who almost from the beginning had been devoted to education exclusively, and, if the matter were pressed, the first one of all the seven who had labored himself in *all* the grades of education from the elementary work of the common schools to the work of the Theory of Teaching in two of our foremost State universities (Michigan and California), the whole being crowned by five years

of service at the head of the National Bureau of Education at Washington.

The preparations for the installation had been carried on for some time and with a concerted effort of many heads and hearts. In fact, the present historian, whose concerns have extended to the full life of the eighty years of our New York University, from 1830 and 1831 on, recalled no academic occasion whatever in that large period of time, either where the Alumni took so large and vigorous a part, or one which, through the participation of so large and so distinguished a number of our foremost institutions of learning wore and possessed so decidedly a quasi-national air of importance and interest. It seemed as if a universal activity had seized both Corporation and Alumni, and one was reminded of the noble words of a European poet:

"And in onward, joyous movement
All the forces stand revealed."

And where so many worked with willing devotion, it would be virtually impossible to name them even, but the initiative and the generous spirit of William M. Kingsley, Esq., A.B., 1883, Treasurer of the corporation, should be especially recorded. Especial reference should also be made to the untiring efforts of the Director of Ceremonies, Edward Hagaman Hall, L.H.M., L.H.D., who arranged many of the features of the program and who was the author of the form used in the Ceremony of the Induction.

On Monday night, November 6th, the gymnasium, draped and adorned as never before in the prevailing tints of the Violet, saw a reception and ball by the undergraduates of University Heights in honor of the Chancellor and Mrs. Brown.

The enumeration of delegates and institutions of learning represented by them will be found further on. Some one hundred and twenty institutions of learning were represented, also the more recent foundations for scientific, academic and social beneficence bearing the names of Mr. Andrew Carnegie, of Mr. John D. Rockefeller and Mrs. Russell Sage. Of this imposing number only the following American institutions antedated 1831, the year in which New York University received its charter, viz.: Bowdoin, University of Vermont, Middlebury, Brown, Yale, Trinity, Harvard, Amherst, Williams, Columbia, Union, Hamilton, the University of the State of New York (as an administrative corporation representing the State directly), the University of

Pennsylvania, Princeton, Hampden-Sidney, and the University of Virginia. The latter was founded by Thomas Jefferson, while his Secretary of the Treasury, Albert Gallatin, was for a short time, and at the beginning, the President of the Council of New York University. The second President of the same, Morgan Lewis, a former Governor of the State of New York, had often slept in the tent of George Washington as the latter's adjutant.

The procession of these one hundred and thirty delegates, in the official garb of academic robes, was given particular distinction by the bright scarlet of Oxford worn by the Right Honorable James Bryce, British Ambassador, whose services to the better self-knowledge of America have been and will be so beneficial, and by the personal presence and share in the exercises on the part of Mr. Andrew Carnegie, whose academic benefactions are known of all men. The exercises of the morning were felicitous in the symbolic functions attending the induction of the new Chancellor; the Secretary of the corporation presenting the great seal; the Librarian of the Law School, the charter; the Bursar of the University offering the keys, and the Senior Professor in actual service, the Hon. Justice Isaac Franklin Russell, bearing a massive silver torch especially presented to New York University by Miss Helen Miller Gould, to whom University Heights and all of New York University is indebted for so great a part of its life and substance. The addresses of both forenoon and afternoon, as well as those at the banquet at the Hotel Astor, will be found in the body of this publication. That the inaugural address of Chancellor Brown must needs claim the largest share of attention for this brief historical notice, goes without saying. It is printed further on, but, even so, it has appeared wise to me to excerpt from it some aphorisms or other important passages. He quoted in modest self-depreciation a phrase from St. Paul: "I am, indeed, in the position of a wild olive which has been grafted into this good olive tree."—"The first requirement of the University's organized research is the requirement, that it shall know the social fabric of which it forms a part."—"Even in our day, when the concentration of educational practice has proceeded much further than in the second quarter of the nineteenth century, our higher education is still largely on an individualistic and competitive basis. Our university spirit is still too largely the spirit of the clan."—"Here is a world within municipal boundaries which is to be a light to itself and to the greater world beyond."—"The occasional outcry

against the higher schools can no more check this progress than would a protest against Orion and the sweet influences of Pleiades."—"Yet no one who has apprehended the germinal power of religion in human life can doubt that through all manner of change, and even through occasional estrangement, these two are destined to work together to the end."—"It is a matter of wonder that the University should have been able to maintain so good a teaching standard on so small an outlay for instructors."

The large banquet hall of the Hotel Astor was the scene of the Evening Reunion of Guests, Faculties and Alumni. Whether viewed socially or academically, it will stand out and stand by itself as quite the most impressive function in the eighty years of the life of New York University. It also is notable for the cordial felicitations uttered directly to Chancellor Brown by a delegate from Harvard, and by the Presidents of Yale, of Columbia, a delegate from Princeton (at this moment still without a president) and the President of Cornell. Canada had spoken in the afternoon through a distinguished jurist, whose solidity of attainments was deepened by his strong grasp of the classics. Ladies added much grace and brightness to the vast assemblage. As to the Alumni, this great day was favored as none other had been; for in the morning the Rev. Dr. Henry Bond Elliot of the class of 1840 had spoken, spoken with a clear and resonant voice. Even to see and hear a man *who had seen all the Chancellors* who guided our College and its history during so great a part of a century was a rare pleasure. It was as if History herself and Time had taken human form and come before us. Medicine, Law, Graduate School, Pedagogy, Veterinary School, School of Commerce, Accounts and Finance, and especially the "Uptown Schools" were represented in the vast assemblage. In this brief survey we must be content to mention, like some academic vintage of many years, the mere figures of graduation dates: '40, '43, '47, '48, '54, '56, '60, '62, '63, '65, '69, '71, '72, '74, '75, '76, '78, '80, '82, and all succeeding classes. In fact, every interest was there, and everything was pulsating with joy and hope and beaming such sentiments from happy faces.

The exercises of the second day, Friday, November 10th, were held in the Auditorium at University Heights. Chancellor Brown presided. It was a convocation for educational discussion, details of which will be published in a later bulletin. The themes assigned were largely concerned with the problems and functions of an urban university. The idea

of this discussion was a distant result of the very first general conference on the problems of higher education ever held in the United States. It was the so-called "Convocation of Literary and Scientific Gentlemen, held in the Common Council Chamber of the City of New York, October, 1830." It was in the era of John Quincy Adams and Andrew Jackson. That this important conference had its discussions duly recorded was largely owing to Mr. John Delafield. Many of the names of the participants have not lost any luster after eighty-one years. There were present Hodge and Patton of Princeton, Silliman and H. E. Dwight of Yale, Jared Sparks, Theodore Woolsey, Francis Lieber, John Trumbull, Dr. Emory, Gallaudet and Albert Gallatin. Letters were received from Judge Story, from Edward Everett and from George Bancroft.

After eighty-one years another convocation was held; apart from many professors of New York University, the following institutions were represented: Harvard, Columbia, Union College, Brown, Vanderbilt, The Chautauqua Institution, The Polytechnic Institute of Brooklyn, Wells College, Oberlin College, University of Vermont, the University of (the State of) Washington, Fordham University, the Normal College of the City of New York, Ohio State University, Haverford College, the College of the City of New York, the Institute and Training School of Young Men's Christian Associations, Chicago, Ill. Dr. Henry Leipziger, the enthusiastic organizer and Director of the Lectures for the People, took an important part in the discussions of the afternoon.

THE MORNING EXERCISES

The morning exercises opened with an academic procession of more than 700 persons across the Campus, through the Hall of Fame, down Morse Walk to the Mall and thence into the Library. The procession was made up of four divisions. The first division consisted of the speakers, led by Honorary Marshal Edward E. McCall, LL.D., '84, Justice of the Supreme Court and President of the Alumni Association of the Law School, and the Governing Bodies and Patrons of the University, led by Honorary Marshal Gerard B. Townsend, B.S., LL.B., '87. The second division consisted of the Delegates from Foreign Institutions, with DeWitt L. Pelton, Ph.D., '85 as Honorary

Marshal, the Delegates from Institutions in the United States, led by Honorary Marshal Victor J. Dowling, LL.D., '90, Justice of the Supreme Court, and the National State and City Officials led by Honorary Marshall Ernest Hall, LL.D., '66, Ex-Justice of the Supreme Court. The third division included the faculties of the ten university schools marching in the order of the foundation of schools. The fourth Division consisted of the Honorary Alumni and Alumnae, the Alumni of Arts and Sciences and the Representatives of Classes of the University Schools, the Honorary Marshal of this division being David H. Ray, Sc.D., '02, Chief Engineer, Bureau of Buildings of the City of New York. As the head of the procession reached the library porch, the columns divided while a countermarch was executed, the rear of the procession marching first into the library, the speakers entering last.

The presiding officer of the morning exercises was Dr. George Alexander, President of the University Council. The Invocation was given by Dr. Francis Brown, President of Union Theological Seminary. After a rendition of Handel's Largo by the organ and orchestra the chairman called upon Eugene Stevenson, Vice-President of the Council, for the first address of the morning.

ADDRESS ON BEHALF OF THE CORPORATION

"Mr. President, Ladies and Gentlemen: A pleasant and easy task has been assigned to me to-day. As the representative of the Corporation of New York University I am to greet you and bid you welcome, and this I do with all my heart. And then I am to tell you in a few words, what probably you all know already, why we are assembled here.

We meet to inaugurate the seventh Chancellor of our University. Through eighty years of persistent and grinding toil this institution of learning has attained its present place of usefulness and power. The world at large will never know the stories of poverty, labor and self-sacrifice which are written with a pen of iron in our unread and unpublished chronicles.

To-day the clouds have lifted and the sky is bright, and it may be (who knows?) that the immortal spirits of Frelinghuysen, Ferris, Draper, Martin, Mott and Pomeroy, and all their faithful associates in their work of love are

with us now, sharing our joy and hope, and giving us their tender, solemn benediction.

We have had strong men to guide us in the past from Frelinghuysen to MacCracken. The achievements of the grand old man who has just laid down the burden of leadership will be written large in the history of New York University. But we live in the present, and to-day our eyes are turned upon the future.

'Time is like a fashionable host,
That slightly shakes his parting guest by the hand;
And with his arms outstretch'd, as he would fly,
Grasps in the comer.'

The coming man whom we grasp in our arms, the present Chancellor of New York University, is with us here to-day to be installed in the place of responsibility and power which he will occupy, we hope, for many, many years.

The Corporation of the University with pride and confidence presents Elmer Ellsworth Brown as its Chancellor to its faculties, its students, its alumni, and to the great intellectual, social and religious world which is represented in the life of this great city.

May I say in conclusion one word to the great loyal body of alumni of the University in all its departments. Give, I beg you, to the man whom we have chosen as your leader, your trust, your affection, your enthusiastic support. Fellow alumni present here to-day, I boldly and urgently ask and claim on behalf of the University Corporation, that you at all times hold up the hands of Chancellor Brown, stand by him, and especially try to cheer his heart in every hour of discouragement with the consciousness of your loving sympathy.

The springs of life and usefulness of New York University must rise from the lives and hearts and service of her children. If you and I, all the grateful sons and daughters of our Alma Mater, will give her and her new leader trustful and sympathetic support, the future history of New York University will be a record only of splendid and successful effort—of noble and lasting achievement—in that wide and beautiful field where men work for mankind."

THE LETTER OF APPOINTMENT

The presiding officer called upon George A. Strong, Secretary of the Council, for the reading of the letter of appointment.

April 24, 1911.

ELMER ELLSWORTH BROWN, Ph.D., LL.D.,
United States Commissioner of Education,
WASHINGTON, D. C.

DEAR SIR:

I have the honor to inform you that at a meeting of the Council of New York University, held April 24, 1911, you were unanimously elected to be Chancellor of the University, to succeed Henry Mitchell MacCracken, D.D., LL.D., whose resignation, accepted with sincere regret, took effect upon his seventieth birthday anniversary on the 28th of September last.

In calling you to the office so brilliantly and successfully filled by one who, as Vice-Chancellor and Chancellor during a quarter of a century, has done so much to raise the University to its present distinguished position among the educational institutions of our Country, we feel confident that his mantle will fall upon capable shoulders.

Your own successful career as teacher and administrator, covering a period of thirty years, beginning in the public schools of the west, continuing in two of our well-known American universities, and for the last five years in the office of United States Commissioner of Education, has qualified you, we believe, to carry forward effectively the work of New York University, and to make you a worthy successor to your six predecessors in the Chancellorship.

If it shall please you to accept this election, we shall be happy to have you enter upon the discharge of your duties on the 1st day of July next, and we will arrange for your public installation at some convenient date in the fall.

Trusting that this invitation to a large field of usefulness in the Metropolis will appeal to you as a call to duty and will evoke your early acceptance, I remain, in behalf of the Council of the University, with assurances of our high esteem,

Yours very truly,

GEORGE A. STRONG,
*Secretary of the Council
of New York University.*



THE MORNING PROCESSION FORMING

Right to left: Honorary Marshal Edward E. McCall, LL.D., '84; Rev. Dr. George Alexander, President of the University Council; Chancellor Brown; Chancellor Emeritus MacCracken; Rev. Dr. Francis Brown, President of the Union Theological Seminary; the Senior Alumnus, Rev. Dr. Henry Bond Elliot, '40; Hon. Eugene Stevenson, Vice President of the University Council; the Senior Dean, Dr. Clarence D. Ashley of the Law School.



MORNING PROCESSION MARCHING THROUGH THE HALL OF FAME

Front to rear: Dr. Alexander; Chancellor Brown; Chancellor Emeritus MacCracken; Vice-President Stevenson; Presley Downs Stout, Senior Class Orator; Secretary George A. Strong of the University Council; Professor Leslie J. Tompkins of the Law School. Frank A. Hall, President of the Law School, is also present.

THE INDUCTION

After the reading of the letter of appointment the audience was requested to stand while the ceremony of Induction was performed. The Librarian of the Law School bearing the Charter and Statutes, the Secretary of the Council bearing the Great Seal, the Bursar bearing the Keys and the Senior Professor bearing the Torch, came forward and took their stand near the President of the Council, who spoke as follows:

"ELMER ELLSWORTH BROWN, Doctor of Philosophy and Doctor of Laws, the Council of New York University, exercising the authority vested in it by its Charter and Statutes, and reposing confidence in your character and ability, has elected you to the high and responsible office of Chancellor of the University, and has now summoned you to this presence, to the end that you may, before the Council and these witnesses, reaffirm your consent heretofore given and receive public confirmation of your authority.

It is my duty, in behalf of the Council, representing the Government and Estate of the University, to charge you that you assume this office with firm resolution to devote your powers single-heartedly to the upbuilding of the University and to the moral and intellectual edification of those who enter within its gates.

As Chancellor, you become the Executive Head of the University. As the Chairman of the Executive Committee, as a member of every Standing Committee, as the Head of each Faculty, as the medium of communication between each Faculty and the Council and between the Students and the Council, as the Supervisor of the performance of the work entrusted to subordinate officers and to those instructing the youth who enter these doors, your influence, as Counsellor and Friend, Leader and Helper, touches every part of the University's life. And when, in the fullness of time, the impress of this University has been stamped upon the character of its students, it is your hand that bestows upon the graduates those outward testimonials and honors which alike betoken the privileges which they have enjoyed and stamp the seal of approval upon the work which the University has wrought in them.

Seeing then the sacred nature of these duties, I ask of you, in the name of the Council of the University, do you remain steadfast in your purpose to assume these weighty respon-

sibilities, and do you in the presence of these witnesses ratify your consent to take upon you this office?"

CHANCELLOR-ELECT: "I do."

PRESIDENT OF THE COUNCIL: "Will you perform these duties in the spirit of sacrificing service to your fellow-men putting away all self-seeking, and looking for the recompense of a good conscience and the knowledge of a high stewardship well and faithfully discharged?"

CHANCELLOR-ELECT: "I will, by God's help."

PRESIDENT OF THE COUNCIL: "Then by the power delegated to me by the Council, I confirm you in the office of the Chancellor of the University, and confer upon you all the authority, rights, honors and insignia to that office pertaining:"

DELIVERY OF CHARTER AND STATUTES

"And that you may have a continuing remembrance of the high authority of this University as a part of the educational system of the State and of your privileges and responsibilities derived therefrom, I deliver to you a copy of the Charter granted by the State of New York and of the Statutes of the University made pursuant thereto, fervently praying that your labors may be richly fruitful in cultivating the objects for which the University was incorporated." (Here the Librarian of the Law School came forward and delivered to the Chancellor the Charter and Statutes of the University.)

DELIVERY OF GREAT SEAL

"That you may know the sign by which, together with your signature, the official acts of the University are to be attested, I deliver to you the Great Seal of the University. As this sign encourages, with the motto "*Perstare et Præstare*," those who run in the uplifted light, so may your administration, in its impress upon those who here seek the prizes of wisdom and knowledge, inspire them, in their life course, to persist and excel in all that is good, and noble, and true of heart." (Here the Secretary of the Council came forward and delivered to the Chancellor the Great Seal of the University.)

DELIVERY OF KEYS

"As a token of your jurisdiction over the material fabric of the University, and a reminder that your manifold duties relate as well to its corporal growth as to its educational efficiency, I deliver to you the Keys of the University. May you so conserve the interests committed to your care that

the University shall stand well-approved in the sight of men, and shall merit that support which is requisite for its maintenance." (Here the Bursar came forward and delivered to the Chancellor the Keys of the University.)

DELIVERY OF TORCH

"But that you may not forget that the chief function of this Institution, the very reason for its being, is to enlighten the minds and kindle the aspirations of those who enter its precincts, I deliver to you this Torch as a symbol of your ministry to the informing spirit of the University. Under your guidance, may it continue to shine as a light set upon a hill, illuminating with true knowledge the minds of those who approach its sacred flame." (Here the Senior Professor came forward and delivered the Torch to the Chancellor.)

The President of the Council then turned to the assembly of witnesses and said:

"FORASMUCH as Elmer Ellsworth Brown, Doctor of Philosophy and Doctor of Laws, having been elected Chancellor of New York University, has accepted his election and promised faithfully to discharge the duties of that office, and has been duly invested with all the dignity, powers, privileges and insignia of Chancellor of the University, I require that all persons subordinate to the authority of the Chancellor yield him obedience as such. We crave for him and for the University the friendly support and sympathetic co-operation of the great community here represented, to the end that the University may fulfill to the utmost its functions as an instrument of human culture. And that it may be a power for the enlightenment and uplift of mankind, whose beneficent influence may grow from generation unto generation, we invoke upon the relation now established the favor of Almighty God."

THE INAUGURAL ADDRESS

The audience having taken their seats the presiding officer introduced Elmer Ellsworth Brown, Seventh Chancellor of the University, who gave the following address:

"It is fitting that one who assumes this high responsibility should pay his tribute of respect to the Fathers of the University and declare his adherence to the principles which they builded into its foundation. Such a declaration would seem peculiarly appropriate when the incoming chancellor, as in the present instance, was not born into the family of

New York University, but has been adopted from the outer world.

I am, indeed, in the position of a wild olive which has been grafted into this good olive tree. The outer world from whence I have come is that of educational institutions under governmental control, of which the most advanced scholastic representatives are the western state universities. Must that earlier allegiance then be forsworn in entering upon these newer relations? After many years of service in the Universities of Michigan and California, which I have come to hold in deep reverence and affection, such a severance of the old ties would not only be personally painful: it might seem to indicate a certain lack of academic principles and loyalty on the part of him who should make the change.

Let it be said, then, at the outset, that the reason why a man may come with so great freedom into New York University from the state universities of the West, is that he may bring his convictions with him. The essential spirit of those universities has been conspicuously present in this institution from the beginning. Both its earlier and its later history, indeed, is full of that sense of public duty and responsibility which has gained for the state universities their present influence and leadership. These institutions are alike in interpreting their public obligation as an obligation to the whole people. It is not too much to say that some of the earliest and clearest utterances setting forth this more modern conception of academic service, were those which accompanied the founding of the University of the City of New York.

The institution was to be established 'on a liberal foundation, which shall correspond with the spirit and wants of our age and country, which shall be commensurate with our great and growing population, and which shall enlarge the opportunities of education.' It was proposed at the very beginning that ample provision should be made for the customary classical and professional education; but that there should be added thereto an opportunity for training for agricultural, commercial, and the higher mechanical pursuits, together with other provision for other needs which the scholastic tradition had failed to meet.

The most advanced ideal of our state universities has been set forth by President Van Hise, of the University of Wisconsin, who has said of that institution that it proposes to render to the state every needed educational service for

which it shall be found the fittest instrument. It would be hardly more than the reiteration of a fundamental principle of New York University to say that this foundation proposes to be as widely serviceable as possible in the higher education of this community, in so far as it shall be found a fit instrument for such service.

1. An institution which is committed to the program of doing new things to meet new conditions, is committed thereby to a new study from time to time of the situation in which its part is to be played. The first requirement of the University's organized research is the requirement that it shall know the social fabric of which it forms a part. In other words, the first business of a modern urban university, such as this, is to know the life and needs of the modern city which it serves. The study of the city's life and needs from this point of view, is not to be an occasional undertaking, but a continuous activity, an indispensable part of the University's system of research and of administration.

But since to know thoroughly is to interpret, it is not enough that the city's life and industry be the subject of continual study in university departments of economics, of statistics, and of sociology: the University is to have insight into the forces which make for betterment, into the striving after civic righteousness, into that pride in all things honorable and beautiful which makes the city desirable as a place where men may live the one, true life of man. The University is to know these things as a participant and a creator. In the spiritual world demand and supply are subtly joined together. The supply precedes and creates the demand. The University is to be to the city a maker of new and higher wants. It is to offer that which men, having seen, shall desire with the purest striving of the human spirit.

2. Let it not be thought, however, that this University or any university can limit itself to merely local relationships. New York University from the beginning was designed to render its first service to the City of New York. Yet it was from the beginning, by statutory provisions, a member of the University of the State of New York. Furthermore, in the very nature of our social organization, this University and every university in all the land, is a participant in our national scheme of higher education. It becomes in reality a member of our National University. The Fathers of New York University saw this truth, even in

their day of educational separatism and isolation: and they gave expression to their faith by calling a convention of the leaders of collegiate education in their own and in other states. Even in our day, when the concentration of educational practice has proceeded much further than in the second quarter of the nineteenth century, our higher education is still largely on an individualistic and a competitive basis. Our university spirit is still too largely the spirit of the clan. In this respect, universities lag behind the better spirit of the age. The conception of a national education, in which every institution is an organ of one comprehensive organism, and all are members one of another—this conception is gaining ground but slowly. Nevertheless, it is gaining ground, and our higher patriotism is bound up with it.

This institution holds itself to be an essential part of the Nation's University. So far as in it lies, it will labor for the building up of our national education. It will live and do its appointed work for all of our people, throughout the land. It will look for an attendance of students from all of our states: and in an important sense it will endeavor to be a true intermediary between the life of the city and the life of the country at large.

But even while we are considering our relations with education conceived as a national concern, we find that the national view itself has become too narrow. There have already appeared the beginnings of an international and even a world system of higher education. A world-standard of academic teaching and academic degrees is almost insensibly taking form and gaining recognition. No true university can be indifferent to this situation. No university can hold the unqualified regard and confidence of its students and its benefactors unless it make for itself a genuinely international character. It must assure to its graduates an unquestioned standing in the world of scholarship. And it must enter without disparagement into those common labors through which all true universities are determining what the world standards in education shall be. This is an historic condition, but it takes new form and significance in our modern age.

That this institution has long been mindful of an ecumenical character which attaches to the university name, has been made evident in many ways: by the goodly number of students from foreign countries to whom it has given instruction, by the wide distribution of the publications of its most eminent teachers, and notably in recent time by visits



THE MORNING PROCESSION MARCHING DOWN FOUNDERS' ROAD TO THE MALL



THE HEAD OF THE MORNING PROCESSION ENTERING THE LIBRARY

of its Chancellor Emeritus to the universities of the Scandinavian countries and of other parts of the world for the promotion of a mutual understanding among the scholars and teachers of these lands.

From the widest reach of academic relationships, however, we come back to the questions which lie at our door. The more we contemplate the scholastic solidarity of the civilized world, the more clearly we shall apprehend the educational problem of our own metropolitan area. Here is a world within municipal boundaries. Its people in great numbers are entering the higher schools. Even so it is far behind other cities and even behind whole states in the proportion which the attendance upon its colleges and universities bears to its total population. Ohio, with a population equal to that of this city, has 3,000 more students in its higher institutions. Twenty other states show a larger proportionate attendance. Chicago, Philadelphia, and the metropolitan district of Boston, the three cities next in size to New York, all show a higher attendance ratio. If New York came up even to the average of these three cities, the attendance upon her colleges and universities would aggregate not 12,000 students, as at the present time, but not far from 20,000 students.

These figures are cited neither for praise nor for blame. They admit of a variety of explanation. The moral which they point in our present discussion is simply this, that New York is not now sending an over-large fraction of its population to college; that it is, in fact, educating only a very moderate proportion of its people in its higher institutions; and that it will in all probability show a great increase in its college attendance within the coming years. The normal increase of over 100,000 souls a year in its population, and still more the general advance of a civilization which is peculiarly dependent upon the agencies of instruction: these things point to a great expansion of collegiate attendance within the immediate future. Be sure that our institutions of learning will be taxed to the utmost to accommodate those who will flock to them for instruction. The occasional outcry against the higher schools can no more check this progress than would a protest against Orion and the sweet influences of Pleiades.

Not only as regards collegiate instruction, but as regards science and the arts, the city will make increasing demand upon the universities, and the universities will render to the city an increasing service. Public administration is gradually

growing more scientific. The problems of public health and sanitation, of the supply of pure food and pure water, of transportation and related public services, of taxation, of uniform and consistent legislation, of parks and playgrounds, of landscape architecture and other arts in their public applications—all of these things are already making demands for expert knowledge and competent investigation. If we add business administration, the organization of industrial undertakings, the study of commercial relations, domestic and foreign, we have fairly begun—but no more than fairly begun—to suggest the growing need to be met in such a city as ours by the higher institutions of learning.

A number of colleges and universities are sharing the burden of this mighty responsibility. I am not unmindful of still other institutions, with large and increasing influence, when I speak at this time particularly of those two which are most frequently mentioned along with New York University, her elder sister, Columbia, and her junior, the City College. In an especial sense, it would seem incumbent upon these three institutions that they confer from time to time regarding the general interests of higher education in the City of New York, and that they devise ways in which the educational needs of our metropolitan people may be more fully met. Their separate autonomy and their individual character and mission may not for a moment be called in question. But it is not unlikely that these three, and other institutions working with them, may through concerted action add much to the educational advantages of this great city. I am confident that New York University will be found ready to do her part in the furtherance of such co-operation.

The vision which comes before us is that of a city, one of the greatest of modern times, and the commercial capitol of our Nation. We look to see it adequately equipped with schools of the higher learning in all branches of human thought and endeavor; and to see these schools and other centers of the spiritual life taking counsel together and taking knowledge of the city's need, till the highest opportunity for education shall be brought within the reach of all of our citizens, according to their ambition and their native abilities; while science and the arts shall find their widest application in the city's life. We look, moreover, to see those united agencies of instruction each year scrutinizing anew the city's life and destiny, and going on before its advance, with new plans for better achievements; till the

people, being enlightened at home beyond the common experience of man, shall have light to spread abroad wherever their name and their commerce shall run.

3. Before we go further with considerations relating particularly to New York University, let us consider with the utmost brevity, some of the essential characteristics of any university. Public service is good, but "The gift without the giver is bare." What, then, is a true university, which is to render these public services?

The ancient world furnishes one answer, which is fundamental and cannot be set aside. A university is an institution for the cultivation of the good, the true, and the beautiful. Its relation to the true is universally recognized, at least the true in the typical forms of the physical and mathematical sciences. To put men in possession, not only of well-grounded scientific knowledge, but of the methods by which such knowledge is acquired and extended, to put men in possession of those standards of precision and of fidelity to fact which characterize the scientific spirit—these things are the very elements and commonplaces of university instruction. The freedom of science is the foundation stone of a university. The university man is the scientific man.

But the beautiful is equally an essential object of university cultivation, and science requires the association with art to come to its best. So art requires association with science to come to its best. Of these two, each corrects a certain immaturity and intolerance in the other. Accordingly the alliance of the fine arts with the universities, which has had a fluctuating and uncertain history, is by all means to be fostered and encouraged, along with the alliance of the universities with the physical and the philosophical sciences.

This double alliance with the beautiful and the true is imperative, moreover, if universities are to cultivate adequately the good. So far as the moral life is concerned, universities do not seek merely to intensify ethical sentiments, but to link them most intimately with an organic system of ideas. Your true university man is one whose moral emotions are buttressed and reinforced by knowledge and good taste.

In its thought concerning the good, the ancient world rose to a height which transcended the Greek conceptions, and gave to mankind the elements of religion. The modern world, in a thousand ways, has readjusted the relations of

religion and education to each other. Such readjustments will undoubtedly go forward in the future. Yet no one who has apprehended the germinal power of religion in human life can doubt that through all manner of change, and even through occasional estrangement, these two are destined to work together to the end. The hope for good relations between religion and education is increased when science and art are both of them fairly represented, side by side, in our educational organization.

These venerable conceptions are everlastingly true; but they must be applied to changing social conditions. Our modern life finds its all-absorbing problem in the endeavor to realize a true democracy. Academic institutions are not now concerned simply with the making of superior men. They must send out men who are both superior and companionable. The leaders whom they train must be able to lead, not condescendingly, but through wide co-operation.

It is hard to achieve this combination of democracy with the leadership of the Best, but in that union lies the very heart and focus of our modern life. And universities must succeed in this or yield their place in the van of the world to some worthier type of institution.

One other combination of diverse elements must be a constant concern of university instruction. That is the combination of liberal with vocational instruction, and of both of these with the cultivation of the peculiar endowment of individual students. A liberal education fits a man to view the interests of mankind as if they were his own, while his vocational training fits him to do his own proper work as if it were a work for all. The real university problem here is not the problem of the one or the other of these forms of education but of their connection one with another. The effective correlation of a college of liberal arts and a graduate school with schools of the several professions, is calling for fresh attention to-day, after all of the working adjustments of the past.

Along with this question, the further problem of the conservation of all valuable personal initiative and individuality is not to be forgotten. A futile and disappointing thing unless it be deeply grounded, when originality of thought and character is joined to sound culture and professional competence, it becomes one of the most precious things in the world, a thing to be cherished by universities in the interest of both democracy and leadership.

These are meager lines with which to indicate the char-

acter of a true university, but they may serve the present purpose. Some part of such a sketch is well illustrated in the character and career of Samuel F. B. Morse, whose name is inseparably linked with the earlier history of this University. The service, altogether his own, which was rendered by Professor Morse to all humanity, has shed a peculiar luster upon the institution in which he taught the arts and practiced the sciences. It is well that he should be its first representative in that Hall of Fame which New York University holds in trust for the people of the United States. May we cherish the spirit of invention in both science and the arts, along with a continued insistence upon a training broad enough and sufficiently well balanced to furnish the groundwork for invention of the highest order. So may we hope that great public services may continue to come forth from these halls, which shall fire succeeding generations of students to generous emulation.

4. This University now has its existence at four centers, three of them on Manhattan and one in the Borough of the Bronx, and in twelve colleges and other scholastic divisions. While such dispersion has its disadvantages, it seems inevitable in an institution proposing the wide range of educational service on which this University has entered. If its work can be carried on at so many points simultaneously, it would seem that the number might be increased as the need may arise, up to the limit of administrative efficiency. But new work should not be undertaken until there is reasonable assurance that it will receive adequate support. It is particularly difficult to maintain educational standards in any university division for which only an uncertain and insufficient financial provision has been made. To carry out in New York City a program comparable with that of the state universities, would call for even more liberal support than the state universities receive.

Each addition, moreover, must accentuate the necessity of vigorous co-ordination of the several parts. It is clear that the College of Arts and Pure Science is the natural center of the whole system. It should be not only a unifying center but an invigorating center as well. All pains should accordingly be taken to maintain and to advance the academic life at University Heights. Here, on our forty-acre farm, we may have a country college in the heart of a great city. If we shall maintain here a college that is educationally sound and that offers distinctive values, suited to its location and history, then we shall see ambitious

students coming to us in increasing numbers; then we shall help city and country to see one another more truly on the high ground of academic vision. The lines of connection, too, between the college and the other University divisions should be strengthened as far as possible.

In a great work of art there are unities which, though not obtrusive, are none the less dominant. In an architectural group, for example, as in the buildings of the World's Fair at Chicago, the uniform height of the cornice lines has served to hold the entire composition firmly in one, while allowing wide diversity in the several parts. A great musical work shows even finer unities in theme and form of composition. The suggested comparison is only a partial indication of the educational organization of which a great university such as this is susceptible—an organization which leaves room for self-government and individuality in the several parts while assuring a positive character to the educational undertaking as a whole. Such an organization, making for freedom rather than for mere subordination, can be achieved only by the several faculties, working in unison. As New York University now stands, the first work of co-ordination will not have to be done. The ground plan of a complete university organization has been marked out with a firm hand. It is doubtless owing in large measure to this foresight that the way now seems so clear to the next steps in the organizing process.

The freedom and responsibility of the faculties in these matters are to be emphasized. It hardly need be said that the chief business of college faculties is education. Yet that saying would seem to carry with it the corollary that their chief study is education. A university whose several faculties should largely concern themselves with the study of the principles and practice of instruction as related to higher schools and colleges, might do a great work, it would appear, in the way of concentrated efficiency and prevention of waste throughout all of its departments. Such a university might well be an example of the best kind of unification, the kind in which there is no end of non-conformity, but intelligent, discriminating, stimulating non-conformity. The unity of the spirit in some such sense as this is a thing to be desired. It is to be hoped and expected that a university which achieves such educational unity, will be sought out by many of the choice young spirits of the age, from all parts of the land and from other lands, as a place where competent guidance may be had to an



THE MORNING PROCESSION—RANKS DIVIDED FOR THE COUNTERMARCH

Right to left: President Alexander of the Council; Chancellor Emeritus MacCracken; Senior Alumnus Henry Bond Elliot, '40; Superintendent William H. Maxwell of the New York City Schools; Sir Alfred Moseley; Vice President Stevenson and Secretary Strong of the Council.



THE MORNING PROCESSION—RANKS DIVIDED FOR THE COUNTERMARCH

Left to right: Honorary Marshal E. E. McCall; Chancellor Brown; President Francis Brown; Dean Clarence D. Ashley; Presley D. Stout; Professor Leslie J. Tompkins; Chief Justice Isaac Franklin Russell.

education which is richly worth getting. Such co-operating faculties might impart to a division of liberal arts some of the seriousness of purpose and insistence upon the things that really count, which characterizes the best professional schools; and might impart to a professional division some of that broadly scientific spirit and devotion to public service which is one of the finest flowers of a liberal culture. The two sides, in such a case, would understand each other and really work together.

The School of Pedagogy, in addition to its other golden opportunities, has here a chance to render a noteworthy service. Is it not fair to expect that the systematic study of education, which in such a school is commonly confined to the elementary and secondary grades of instruction, should now and again overflow its banks, and contribute to the making of a pedagogy of the higher education?

By whatever means the end may be accomplished, we cannot doubt that where college faculties are not only effective in teaching but are also expert in dealing with the large problems of education, they will become the true directors of studies to our great classes of university students, who too often waste time through sheer lack of such convincing guidance. It is with large confidence in what the faculties of this University are doing and will do, that I am entering upon a work in the details of which many of their members are more experienced and expert than I. And it is done with a great hope that more and more this may be found to be a good place for the best men to do the work of college instruction.

5. Personal elements and personal values claim particular attention in all of our planning. This University is rich in memories of men and women who, as its students, teachers, governors, friends, and benefactors, have served their age in affectionate loyalty to its name and its ideals. To-day we recall the lives of those who have passed on into larger life; we greet the living who are assembled here, and we send forth our thoughts and our good will to those who are with us in spirit only while they carry on their appointed work in many fields and in many lands. Already, because of the warmth of the greeting which has been extended to me, I find myself identified with the life of the institution in its manifold activities, and abounding in confidence of close relations with those on whom there rests the immediate responsibility for the various university undertakings.

Instruction is an affair of the university, by the faculties, and for the student body. That it may come to its best, the interests of the teaching staff must be carefully guarded. It is a matter of wonder that this University should have been able to maintain so good a teaching standard on so small an outlay for instruction. The situation is one which reflects credit upon the staff of instructors, who in the face of grave difficulty, have shown devotion to their teaching and to the institution of which they are members; and credit also upon the general management of the University, which has carried the courses of instruction forward under circumstances so adverse. Chancellor MacCracken, who had borne for many years the chief burden of this responsibility, and to whom the University is mainly indebted for the mighty transformation of the two decades just past, saw before the close of his administration the dawn of a new day in the finances of the institution. While that day has already dawned, the University is not yet out of the twilight; but there is at least a strong hope and expectation that the improvement of conditions affecting the corps of instruction may go steadily, even if all too slowly, forward.

It is not forgotten that the work of a university is for its students. But the students themselves have so much to do with the shaping of their own affairs, that one is tempted to employ another paraphrase of Lincoln's saying, and declare that a college education is an education of, for, and by students. There are advantages in such a situation. No man is educated until he is self-educated, and we may expect a true light to arise on the problem of college training from those activities which students undertake on their own account. It is the part of simple wisdom that we should maintain an appreciative and indeed a respectful attitude toward those activities.

It does not follow, however, that college faculties are to fall back into an attitude of subordination, after the mediæval precedent of Bologna. From an acquaintance with some few college generations, I am sure that our American students do not ask to be left to their own devices. They do not desire a soft and easy college course. Except for a small percentage—and in New York University I have not yet found even that group—they are ready to go through fire and water for the cause they believe in, and to follow the leaders who can command their confidence. I have no desire to see stiff requirements heaped up by the college, simply because they are severe. But we

need have no fear of stiffness and even severity so long as it carries our students forward to a genuine education. The college that follows the policy of educating well at any cost, even at the cost of hardness and toil, is a college they will love to their dying day, and its diploma will be among their dearest possessions. Such a college I believe every one of the Colleges of New York University has striven to be in the past and such I believe they will strive to be in the future. They deeply value the loyalty and affection of their students and their alumni; and they will strive to hold and deepen that devotion, not by any bids for an evanescent popularity, but by incessant occupation with the task of offering an education that shall educate.

The University values its friends, and it seeks a wider circle of friends. You will ask whether I mean friends who will give largely for its support. And I answer, yes. There is no reason why I should hesitate to say that the University needs and desires such friends. Its purpose is so large that any achievement seems small by comparison. It will need an enlarged and enlarging support to do its proper work. There are a score of directions in which help is needed at the present time. I have alluded to the munificent bequest of Mr. John S. Kennedy, which has cleared the educational plant of the University from debt, and made possible a new beginning in its great enterprise. The heightened hope and courage of our several colleges bears witness to the good which this bequest has wrought. In like manner, the earlier gifts of Miss Gould, Mrs. Sage, Mr. Carnegie, Mr. Havemeyer, Mr. Charles Butler, and others whose high and generous liberality has been equally appreciated—these in like manner have from time to time brought new hope and courage to the builders of this University. Their deeds, without which there would be no university here, should receive acknowledgment on such an occasion as this.

But by friends of the University, I do not mean those only who can give into its treasury. Those donors who have made possible its improvement and expansion within the last preceding administration have repeatedly bestowed upon it a gracious personal interest which has multiplied the value of their gifts. We desire that personal interest on the part of those also who cannot offer any material bounty, for it is itself a gift beyond price. We need a wider understanding and appreciation of the large purpose and the high responsibilities of this institution. We need to have it more generally known in the City of New York that this is not

the City College, nor even a department of Columbia University. Doubtless both of those institutions will share in this desire. We need friends whose counsel and criticism will be to us as a breath of mountain air, when we come upon our dull and sultry days of doubt and sheer discouragement.

We seek the good-will of our neighbors, of many classes and occupations. An enthusiastic alumnus said the other day, 'Why, New York University can have the good-will of every washerwoman in the Bronx.' I hope it may have that good-will and deserve it. It would be quite in accord with American traditions if from some of those humble homes there should come in the next generation men who should reflect the greatest distinction upon the University and upon the commonwealth. We value our relations with the public schools, and we hope for increasing nearness to those secondary schools, both public and private, from which our students are to come.

We seek the good-will of our sister institutions in this land and in foreign lands, whose written messages and whose greeting by their personal representatives have added so greatly to the interest and the distinction of this assembly. Their co-operation and even their generous rivalry will be tonic, and the sense that we are of one family with them all, will strengthen our hands whenever it is brought to mind.

A great company has gathered at this ceremonial and we are conscious of a greater cloud of witnesses who look down from the 'height beyond the height.' All of the original founders of the University are of that larger company. Of the former chancellors there is left only the latest of the line, who, sitting here with us, can look about him upon a University, every division of which is now a monument to his constructive and reconstructive genius. They have made this University the center of a very religious devotion, and the bearer of the purest fire of our Christian civilization. May their intentions and their hopes be abundantly realized.

God helping me, I will do the part committed to me. And speaking more impersonally—for every man comes to his best success only when his individual service is merged in the larger life of an institution—God helping her, New York University will do the work that is given her to do."

ADDRESSES OF CONGRATULATION

The Inaugural Address was followed by Handel's Hallelujah Chorus by the organ and orchestra. The presiding officer then announced the addresses of congratulation, the first of which was given by Henry Mitchell MacCracken, D.D., LL.D., Chancellor Emeritus.

ADDRESS OF THE CHANCELLOR EMERITUS

"From the administrations that are past I bring congratulations to my successor, as he enters upon the New York University Chancellorship. This official title comprises in its three words three distinct names—'New York,' 'New York University,' 'New York University Chancellorship.' I will say a word as to each. I shall not speak of the past for lack of time, nor of the future—for it doth not yet appear as to any one of these three things what it shall be.

This City of New York is an area of land and water within a boundary of about a hundred miles. It is also a collection of buildings with their contents. If every dollar of the tax appraisal represents one day's work, and it is more likely to stand for two or three days' work, New York is the product in tangible form of thirty millions of years of human lives. Chiefly, New York consists of five millions of souls, or, if we include such part of New Jersey as is nearer to our City Hall than is University Heights, of six millions of souls within less than sixty minutes of the Chancellor's office at Washington Square. Here is all the complexity of a modern community, industrial, financial, intellectual, political, social and spiritual. It is to-day the metropolis of the western continent; prophets say that it will be the metropolis of our earth. Having recently visited every city of the world claiming over a million inhabitants, except the cities of Russia and South America, I return more ready than ever to love and to praise our proud city of the waters.

What is New York University? Legally, a corporation of thirty-two persons of any age over twenty-one, of any race or faith or condition, provided that a fraction of them must be citizens of New York. Pedagogically, it is a composite of eight degree-giving faculties, with one hundred Professors and twice that number of instructors and helpers, who are teaching now as many students as our buildings can hold, and more than they can accommodate. Racially, our corporation and faculties are Americans of mingled bloods,

the Teutonic predominating. Politically, they are Liberal rather than Tory, and Tammany as well as Black Republican. Ecclesiastically, they are broad rather than high, and Presbyterian more than Catholic. They belong to that small minority of universities in this state which have no legal connection with any church. Beneficiarily—if I may coin a word—New York University can count only a half dozen benefactors who have given gifts that reached six figures; only one benefactor who used seven figures. Ninetenths, if not ninety-nine-hundredths of the persons who have cast gifts into our treasury have used only four or three or even two figures. I have even fulfilled the official duty of acknowledging gratefully the gift of a book to our library, which, if it had been offered at public auction, would not have brought the widow's two mites which make a farthing. The Omniscient only knows what person has given the most to New York University.

Not a dollar of its property has come from the Government, national or state or municipal. On the contrary, the University is urging against the city a claim for a roadway to the station which was acknowledged by Mayor Low's administration, approved by Mayor McClellan's, but up to date has been repudiated by the present fusion administration. It is also urging a claim against the state, for compensation for injury done by state competition to the oldest veterinary college in America. I learn that both the Republican Legislature of 1910, and the Democratic of 1911, recognized that the State should not crush private business by state college labor, any more than by state prison labor, but the Governors Hughes and Dix, by their vetoes, placed economy before speedy justice. My successor, who for a score of years has served Government education, will know how to urge the just claims of New York University against both the city and the state.

Private giving has made our University. The main obstacle in its way for a quarter century has been the epidemic of business consolidation. Persons afflicted by this malady apply rules invented for building up the tobacco business to the building up of universities. Under the medical treatment of Dr. Taft and of Congress, this epidemic is abating. Such a clear intellect as that of the late John S. Kennedy thought it well to endow university competition in New York City.

In circling the globe the past year, I was surprised to be met in at least ten cities of Asia by New York University



THE INSIGNIA

Chief Justice Isaac Franklin Russell (Senior Professor) bearing the Torch;
Frank A. Fall (University Bursar) bearing the Keys. Preceded by
Dr. Munn and Dr. MacKenzie of the University Council.



MORNING PROCESSION—THE DELEGATES ENTERING THE HALL OF FAME

Left to right: Acting Dean Herbert M. Denslow and Professor Charles M. Shepard, representing General Theological Seminary; U. S. Senator Elihu Root, Hamilton College; Professor Benjamin M. Davis, Miami University; Professor James Oscar Boyd, Princeton Theological Seminary; President John Martin Thomas and Dr. Alonzo Barton Hepburn, Middlebury College.

alumni. They represented five of our degree-giving schools. In the capital of Japan, seven Japanese alumni had organized a New York University Association of Eastern Japan. Also in West Japan, I was indebted for a dinner to three of our alumni. At the close of a day and a half of railway travel from Peking southwesterly to Hankow—the center of the present war in China—we expected to find no lodging save on the mail-boat, which was to carry us near a thousand miles down the Yang-tze River; but on the station platform my hand was grasped by a graduate of our Medical College, who said, 'I am in charge of the medical work here in Boone University, and with my wife have a house on the college campus. You must not lodge to-night on the mail-boat.' We did not.

Daniel Webster, in the Supreme Court at Washington, before Chief Justice Marshall, defending Dartmouth College, exclaimed: 'It is, sir, as I have said, a small college, and yet there are those who love it.' It is quite the expected and natural and proper thing that our little University should be loved by a person like myself—who have given half of my mature life to its service and have seen each of my four children enrolled among its alumni. But my experience in Asia and other lands the past year has led me to feel that, even in unexpected corners of the world, there are those who feel—'It is, sir, as I have said, a small university, and yet there are those who love it.'

The third thing that I was to speak of is the Chancellorship of New York University. The ultimate object of this office was spoken of by me twenty-one months ago in my letter of resignation, as follows: 'The helping of a multitude of earnest students, men and women, to lead more effective lives.' Our statutes give wide scope to the Chancellor in striving for this result. They say: 'The Chancellor shall be the executive head of the University, exercising such supervision and direction as will promote its usefulness and growth.' It reminds one of the General Welfare clause of the United States Constitution. Besides doing everything which the University Statutes appoint him to do, he is to care for the large residuum of necessary work, which is everybody's business and, therefore, likely to be nobody's business, unless the Spirit of the Lord moves some man to discern and to perform the task. So the Spirit of the Lord came upon Gideon, on Jephtha and Samson, quite outside their statutory obligations. It came nineteen hundred years ago upon a nobler man, who justified his

work in Galilee by saying: 'The Spirit of the Lord is upon me, because he hath appointed me to tasks which are urgent to be done.'

I congratulate New York University that her seventh chancellor will strive toward high educational ideals, and will conscientiously obey the command—'Six days shalt thou labor and do all thy work.' For the University, the chancellor, the deans, the councilors, the professors and the students I would offer the prayer inscribed in the mosaic work on yonder dome:

'And chiefly Thou, Oh Spirit, that dost prefer
Before all temples the upright heart and pure,
Instruct me, for Thou knowest. What in me is dark,
Illumine; what is low, raise and support.'"

THE ADDRESS OF THE SENIOR DEAN

The address of congratulation on behalf of the faculties was given by the Senior Dean, Clarence Degrand Ashley, J.D., LL.D., of the University School of Law, who spoke as follows:

"On behalf of the several faculties of this University I have the honor and privilege of extending to you a cordial welcome—We tender our sincere greeting.

The broad mind, indomitable will and never failing courage of your predecessor has built up a great institution. After a long struggle, disheartening disappointments, and bitter financial trials, he has brought the University safely to its present position. Upon these broad foundations you are to build further.

To us your office seems pregnant with opportunity. We believe a great future is now before you.

This city is destined to reach an enormous growth—with its material advantages will increase its intellectual demands, and it requires no gift of prophecy to foretell that New York will be a great educational center. The institutions which faithfully and truly meet these demands, which solve the difficult educational problems of the future, will be doing a much needed work for the world.

But these problems require thought and brain. We must all cordially recognize the fact that each university needs and must have the co-operation and aid of its sister institutions. A noble and generous rivalry and emulation spurs to better effort, but any success of one renders the task of the others the easier. Experience abundantly proves this.

The presence here to-day of representatives from our leading collegiate bodies indicates the friendly feeling existing between those engaged in educational work. Here in New York we must not only help each other, but we must also have helpful suggestions from other institutions throughout the world. In our faculties are representatives from all the colleges, some having degrees from two or three of them. The ideals we have thus gained, the lessons of life we have there learned, are now being actively applied by us, and in our turn we are sending out our graduates to help in their work. Each is thus influenced by the ideals of the others.

There is urgent need for all, and there will be ample financial support for all doing worthy work.

For you, Sir, the future offers great promise. Relieved from the daily, harassing financial demands, which have heretofore beset our executive, you will have more time to devote to the great educational questions of the day. We believe you to be the right man in the right place. We look forward with renewed courage and confidence. We believe that in the far future when you pass on the burden to your successor, the University will have gone through a period of steady, substantial advance, and that you will have carried forward the work most worthily.

We pledge you our hearty co-operation and aid. We greet you with sincere enthusiasm, and again assure you of our earnest sympathy, and deeply felt welcome."

THE ADDRESS OF THE SENIOR CLASS ORATOR

The address of congratulation on behalf of the student-body was given by Presley Downs Stout, Orator of the Senior Class, who spoke as follows:

"Honored Chancellor, Deans and Faculties, Friends, Alumni and Fellow-students of New York University: On this significant occasion, it is my privilege and pleasure to voice the mind of the undergraduate-body. Standing, as we do, at the entrance upon a new stage in our history, we cannot but feel the play of varied sentiments. The presence of him who but recently laid aside the robes of the chief office of our institution recalls the past. Many of us are still undergraduates, who knew and loved him as Chancellor. We are impressed, now as never before, with the magnitude of his work, and the work of those who labored with him; in this work we recognize the solid

steps of progress by which we have attained to our present position upon the threshold of a prosperous future; and as we consider the enjoyments which are ours because of his service here, our sense of gratitude and of obligation to push forward that work is profound.

To-day, we bid welcome to a new leader, and our thought is directed toward the future. The outlines of the edifice at whose portal we are standing we may not discern. For that edifice of the future is not yet reared. What its proportions and its beauty shall be, only our use of the time at hand may decide. The building of it is to be our ever-present care. Whether it shall attain to the imposing grandeur of a temple, or but mediocrity of stature, our present hopes, our present counsels, our present efforts, must determine. That is the responsibility of this hour.

The student-body is keenly sensible of its important share in this responsibility. The world estimates the worth of a university by the character of the men who go out from it. That progress of an institution which is indicated in mere wealth of resources and of material equipment would be but an insecure pretence if it had not a firm foundation in the character of the students. The student-body will best promote the interests of our institution as it most persistently strives to maintain a high standard of symmetrical manhood; and will best further the plans of this new administration as it, first of all, endeavors to prove itself worthy to receive the privileges that are being planned for it. Herein lies *our* peculiar obligation and responsibility. Herein is to be found the real criterion of our expressions of loyalty.

We may not see the progress of the future with definite vision. But we may from the present deduce what will indicate its direction. It is not the least significant earnest of the prosperity of this new era that the enthusiasm of our graduate-body and our faculties finds an equal counterpart in the student-body; that already our new leader has won the trust and loyalty of his students. And I am happy to bring to him, together with their congratulation and Godspeed, the confidence, the affection, and the loyal support of the undergraduate-body."

THE ADDRESS OF THE SENIOR ALUMNUS

The address of congratulation on behalf of the Alumni was given by Henry Bond Elliot, A.M., D.D., '40, the Senior Alumnus, who spoke as follows:

"Mr. Chancellor, Ladies and Gentlemen—I appreciate, Mr.

Chairman, the honor of a place on the programme to-day, though it be only to bring up the rear. I am fully aware, however, that I owe it not to eminence of station or ability, such as marks the speakers who have preceded me, but rather to the presence on the Committee of Arrangements of an expert mathematician. When the question of my possible fitness for the position was raised it was referred to him, and he performed a sum in simple addition. He added and he added and he added the years until he was tired and said, 'Oh, well, let him have it, I guess we can stand it, and it will be just this once, give it to him.' They gave it to me and here I am.

I have learned what are some of the incidents and disabilities of age, but I have also learned some of its advantages. People do, somehow, think more of one who has out-lived three generations. They give him credit at least for having a good degree of vitality, though they ought rather to give credit to One 'in whose hands our lives are and who has set the bound which we cannot pass.' When, as a boy of fourteen, I paced proudly the halls of the old university building, the gem of the neighborhood, and took my seat in alphabetical order beside a man named Downes, nearly thirty years old, just from the farm, I did not dream that when I should reach my eighty-ninth year I would be called to stand upon this platform, on our noble 'Heights,' to speak in behalf of those who have since passed away. Pardon the egotism. It is only to get a grip upon my subject and to show that I do have a claim upon my place to-day.

It has been my privilege to know all the chancellors. A notable list it is, and from the beginning they have all been progressive. Each in his turn and according to his opportunity has pushed the institution farther on and higher up until it has reached its present status; but of them all, giving due credit to each of them, there is not one who has so far advanced its interests, who has given it such constant, untiring devotion, who has brought it educationally, financially, architecturally and in public estimate, so far as the one who now lays down the office and its burdens. It has really seemed that he must have slept with the university under his pillow, only to take it up again in the morning. Thus, while I greet the incoming chief, I hail the outgoing one.

But I must not forget that I am appointed to speak as the voice of that huge body technically called the 'Alumni.'

and let me add the 'Alumnæ' also. Where shall I find them that I may speak with authority as their representative? The former and the latter, where are they? They are like Israel of old, as 'a nation scattered and peeled.' Did I say 'peeled'? No! No! No circumstances, whatever they may be, can strip them of the honors which they have acquired in all the walks of life. They are of every order and every faith. Some of them were lineal descendants of Abraham, the 'Father of the Faithful,' from whom are the grandest names in history, and who are now some of our most respected citizens. Others of the lineage of Constantine, lifting high the red banner of the cross, proclaiming 'In this sign we conquer!' They are everywhere. Dr. MacCracken has just told us how he met them in all the cities of Asia. He might have found them in the jungles of Africa, where our missionaries have lived and died. And everywhere they speak substantially with one voice—one spirit supremely animates them, the spirit of integrity and of fealty to obligation. There may be false notes in some instances, for they are only men, and 'to err is human, to forgive, divine,' but their discords cannot mar the harmonies of the whole. Moreover, as fellow-workers in scholastic service, they seek impartially one end. In the history of our university there has been no aristocracy nor democracy of privileges. After the manner of the bard of Scotland, we declare that whether with many or with few of the guineas of rank in these halls 'a mon's a mon for a' that, and for a' that!' So may it be in the years to come.

I must cease, lest I weary you. What more can I say? In behalf of this great body, as well as on my own account, there are two words in which our message of gratulation can be condensed. The first to you, sir, personally, is 'Welcome.' The other is for ourselves. I speak it reverently. It is 'Halleluiah!' Amen."

In the absence of Bishop Darlington, the chairman called from the audience the Rev. Vincent Phraner, D.D., '48 to pronounce the benediction. An adjournment was then taken until 2:30 p. m. The audience retained their seats while the procession marched out of the building.

RECESS

Luncheon was served at the gymnasium for the delegates and honorary guests and in the Psi Upsilon, Zeta Psi, Delta Phi and Delta Upsilon Fraternity Houses for the alumni and student representatives.

THE AFTERNOON EXERCISES

At two-thirty o'clock the procession again formed, marched across the campus, through the Hall of Fame and directly into the auditorium. Chancellor Brown as chairman welcomed the representatives as follows:

"We are desirous of having as much time as possible this afternoon to hear from our distinguished guests. So the words of welcome that I will express will take the least possible time, but the shorter they are, the deeper they go.

Let me say to you delegates from institutions of learning in this land and in foreign lands, we welcome you from the bottom of our hearts. We welcome you, Mr. Mayor, and we appreciate your coming to be with us on this occasion. We welcome the friends of the University who are here to-day, representing this and that body, or representing only themselves. We welcome you from the bottom of our hearts.

The first response that is announced on our program comes appropriately from the State of New York, by the Honorable Andrew Sloan Draper, LL.D., State Commissioner of Education."

RESPONSE FOR THE STATE OF NEW YORK

ANDREW S. DRAPER, LL.D., STATE COMMISSIONER OF EDUCATION

"Mr. Chancellor, there are so many people in the State of New York, that it is impossible to collect and compound their sentiments upon any subject not already well settled in American public policy unless it is a matter of practically universal and paramount concern. But the support of all schools, high and low, is among the settled policies, indeed is a confirmed passion in America, and I am sure all the people will be glad to have their interest in these uncommon exercises expressed to this University, and their good wishes presented with warmth of feeling to its new Chancellor.

States are very dependent upon universities, even though all the people do not always appreciate them. It is quite possible that states and universities may wholly misunderstand one another. Scholarship is frequently dazed by politics, and politics is sometimes brutally indifferent to scholarship. On ordinary days it is very hard for them

to mix, for scholars have very little patience with the practical difficulties of the state, and the state is not likely to become excited over such questions as whether classical history or scientific research is entitled to the most support; or whether training boys and girls in vocational industries is likely to deprive the professions of medicine and law of the necessary novitiates and prove a menace to the very life of universities. So, the state is glad to come into this University on a day when it will not encounter the danger of running into phantom fights over academic questions which it might not understand.

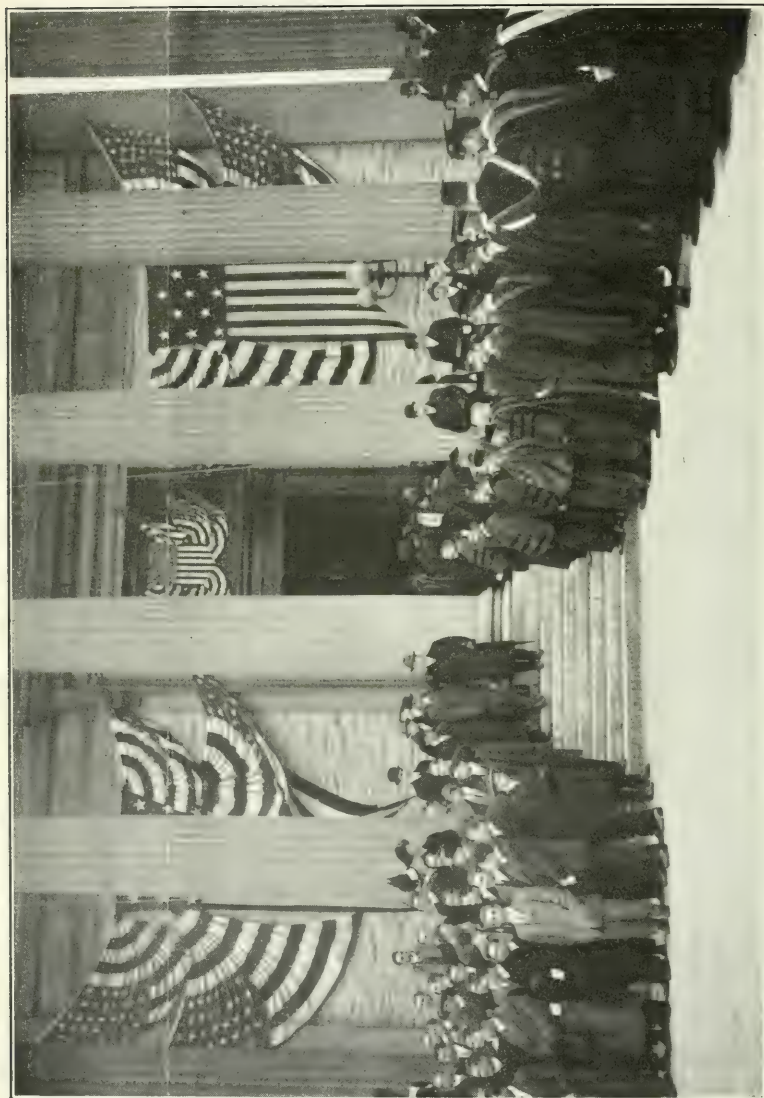
This is a University with a noble history; it is doing efficient work; and it is looking out upon enticing prospects. It is in a great city where there is no end of people to be trained for every kind of leadership, and no end of every manner of work for universities to do. The state asks it to uphold scholarship and do what it can to apply scholarship to life, and, knowing that such is its aim the state wishes this University well.

It is my great pleasure particularly to felicitate New York University upon the accession of the new Chancellor. He has attributes which appeal very strongly to the people of the state. He was born upon a New York farm. Whether or not it is better to be born upon a farm than in a city, there are many men and women in the cities who give evidence that it is. Of course there are a few here who have missed altogether the distinction of being born in the State of New York. If no one will call the matter up against them, neither will any one deny that New York is a very good state for a New York University president to be born in. Chancellor Brown was not only born in a good state, but at a good time. He was born just at the time to get the name of a gallant young colonel of a New York State and New York City regiment, who was the first of a long line of hallowed sacrifices to give his precious life in the war to save the Union. Chancellor Brown in some way missed being educated in the New York schools, but he has been pretty well recompensed for it by life in a vigorous pioneer environment and by training in one of the very best State Normal Schools in the country, at Bloomington, Illinois, and at the State University of Michigan, a university which was the great leader of the state university movement in America, the most marvelous development of democratic institutions of real university grade that has appeared in the long history of world education. Spending a year in Germany, he



MORNING PROCESSION - DELEGATES ENTERING THE LIBRARY

Left to right: Walter Rautenstruch, Esq., representing University of Missouri; Dr. F. W. True, Smithsonian Institution; President Eaton, Beloit College; Pro-Dean Sorapure, Fordham University; President Few, Trinity College (N. C.); President Woolley and Professor Kohl, Mount Holyoke College; President Hatchings, University of Michigan; President McClelland, Knox College; Dean Patterson, University of Louisville; President Davis, Alfred University; Professor Gillett, Union Theological Seminary; E. H. Kuhlman, Esq., Tulane University; Robert Underwood Johnson, Earlham College; Professor Paton and Professor Mitchell, Hartford Theological Seminary; C. A. Williams, Esq., Oberlin College.



MORNING PROCESSION—FACULTY DIVISION ENTERING THE LIBRARY
Applied Science Faculty ascending steps; Graduate and Pedagogy Faculties in the rear.

began teaching at the University of Michigan, and soon earned a professorship, which was continued at the University of California. This led him to know how states and universities may work together for the profit of each, a little better than all of us in New York realize. That knowledge produced the best history of the American middle-schools that has been written. Those are the schools of American creation which are at once the expression of our democracy and the connecting link in American education and which go further than any middle schools in other national systems of education to give all children their even chance. That book and the work that was behind it raised him to a place in the teachers' guild which is honored by all of the pedagogues and many of the people of the United States. In turn that lifted him to the office of United States Commissioner of Education, and it may be suspected that the call to your Chancellorship came in happy juxtaposition with his discovery of the tribulations, and perhaps the emptyhandedness, of an excellent teacher and a virile pedagogical author in pleading for needed appropriations at the hands of congressional committees. However that may be, it was high time to come home. It is splendid to go out West and gather up the thinking and the doings of pioneer people, and work with universities that express their highest aspirations, but it is well for the young men who do that to come home when they reach the place Dr. Brown has gained, and most certainly so if there are great universities in the home state that ask them to come and lead them. To be sure, not many of us have been accustomed to associate Chancellor Brown with a university presidency. He has seemed to fill the concept of a professor to the full, but we have never recognized the readiness to give pain or the strength to endure it which President Seth Low, when at the head of Columbia, used to say were the necessary attributes of a university president. We have never thought of the qualities in him which can deal with faculties as well as with students, and can speak to the public in such decisive and authoritative ways as we are accustomed to see setting so lightly on the shoulders of the successful university presidents. But we have no apprehensions. A good jurist may never be a great lawyer, but a great lawyer can cultivate the temperament and the habits of a first-rate jurist. Not all of the university presidents have the attributes of great teachers, but a real university will sustain a great teacher in the Chancellor's or the President's office; and it will be

surprising if this one does not develop the ordinary attributes of his peers.

The state that chartered this University congratulates her upon calling such a son of the state back to his just inheritance and to her ennobling service. All in all, the day is a radiant one in the history of this University, and the State of New York expresses to New York University and to its new Chancellor the felicitations and the good wishes of the millions of people and of that mighty complexity of moral, intellectual, industrial, and commercial activities which enter into the Constitution and are concerned about the healthy life and the genuine progress of the Empire State."

RESPONSE FOR THE CITY OF NEW YORK

HIS HONOR WILLIAM J. GAYNOR, MAYOR

"Mr. Chancellor, Ladies and Gentlemen: I am very glad to be able to come here and participate in this occasion, but I can say only a word. I have listened with great interest to Dr. Draper's remarks, and after hearing him I am quite satisfied that in place of a board of education of forty-six in the City of New York, we could do with the number seven, which the last two charter commissions recommended, and possibly with even one, like the State of New York. After hearing him I am much in doubt whether the next charter commission may not recommend one, the same as the state has, and we will have another debate over the subject, with Dr. Draper no doubt on the other side of the question. New York, notwithstanding the many evil things said of her by those who want to say something bad of her, principally because they are bad themselves, has many things to be proud of, but she has nothing to be more proud of than her facilities for education. We have done our full duty as a people in that respect. Our universities, our colleges, our magnificent system of common schools, not excelled in the world, our libraries, our museums, our galleries of art, all combined, have an educational influence upon the people of this city that cannot in the long run or in the short run fail to be felt in the government of this city as well as in the social affairs of this city. I repeat that we have done our full duty in this respect as a people. I say duty, because the first duty of the citizens of a free government is to provide educational establishments. And I need not say to so intellectual an audience as this that free government, the formation of free government, the continuance of free

government, depend entirely on the general diffusion of education among the people, from the university graduate down to the one who goes to the common grammar school. That is so of every free government, but it is far more so of the free government which depends on manhood suffrage, on universal suffrage, as we ordinarily express it. Because unless we can get a fairly well educated man—and that means a liberal man—not a little narrow-minded fellow that would vote a ticket because his grandfather voted it the same way—we cannot get a good result from universal suffrage. That may not be so of every vote, but it must be so of votes enough to control. In order to control sometimes votes may have to pass with great facility from one party to another year after year, and it is our aim to educate people who will do that and not merely begin to whine and say, 'Oh, my grandfather voted the Republican or Democratic ticket, and my father voted it, and I will vote it forever, and nothing else.' If our education comes down to that we are a poor lot indeed, aren't we? The career of the educated man has grown wider and wider, until now he enters into all phases of life. His horizon was once very narrow indeed. Shakespeare in 'Hamlet' expresses it, of the period in which that great play is cast. When speaking of the young men of that time, he said, stating where they had gone—'Some to the war to try their fortunes there, some to discover islands far away, some to the studious universities.' And that was all. That was the career of a young man at that time. There was nothing else open to him. Indeed, at one time there was nothing but the Church, because the preachers were doing everything, even curing us of our diseases, or trying to, and killing us in the bargain. But in the growth of God's time that is no longer so. By the force of education the center of thought has passed from the few to the many. Everything is now open to the educated young man. What Shakespeare said looks awful small to us now. Afterwards they went into what were called the learned professions. But now the phrase the learned professions is too narrow. It is too restricted and is misapplied, because we now have many learned professions. The mayor of this city appoints twenty-six heads of departments and bureaus for the government of the city. I suppose the President of the University of Chicago and some of our friends from the West who read certain newspapers, which God in His inscrutable reasons allows to be published here, think that those twenty-six people, includ-

ing the mayor, are a lot of thugs. I do not know how they can think otherwise when they see the way they are spoken of and the way they are pictured throughout the country. But I beg to say on this occasion that nearly all of those twenty-six men are graduates of universities and colleges of high standing. I cannot enumerate them all; there are so many of them I cannot remember them myself, until I get them in a room and look at them. But there are Tomkins, and Thompson, and Waldo, and Murphy, and Watson—and so it goes—from Princeton, Harvard, Yale and other colleges and universities, and many of them from our own right here in the City of New York; I believe two-thirds or over. Everything is open to you, and I am bound to say you are taking everything. I do not say literally that you take it all, because there are some people in this world who, just like many of you, would get along even though you did not have the advantage of a university or a college education. I am reminded of that stilted observation of Gibbon, that 'the power of instruction is seldom of much efficacy except in those happy dispositions who would manage to get along without it.' I do not want to profess my literal belief in that. Those with the advantage of a college education have a great advantage over those who have it not, because those who have it not, but come within the literal term of Gibbon's statement, have to toil terribly to get it. They do get it, and maybe it is worth more when they do get it, but they have to work for it and work hard. It is often said in the legal profession that no lawyer ever comes to fame with a straight back or without a pale face. That is literally true of the young men who do not get their education in the universities, but get it by the light of their candle and by the terrible toil which I have mentioned to you. So much for the advantages of education. You enter the race with a great advantage in your favor. Make good use of it. Every one that goes out of a college or university has a sacred trust reposed in him, and those who come out not knowing that come out not knowing one of the most essential things that he should know in coming out. He owes a duty to society as well as to himself. He is not a man simply to come into any community to aggrandize himself and to satisfy his own greed. No, he owes the duty to society to watch public affairs, to participate in public affairs, to lift the community up, to do his part, in a word, as a good citizen to make the community in which he lives a good community and a well-

governed community. If he fails in that he fails in the essential thing for which he was given an education. But you do not fail in it. Those educated in the schools of this country, the common schools, are prepared up to a certain point to be good citizens, and after them come others with a better education, until finally we reach the top—the university graduate. And those who know most and have the most virtue—to use a homely phrase which was much in use when I was a boy—slop over, as it were, and what they know and what they are is thus communicated to all society, and helps society and lifts it up, although they sometimes are unconscious of it. In the last analysis, they say, public sentiment is made by only a few people. I used to say by one person to each block in a city, and a man told me one day never to say that again to a popular audience, for they would all vote against me if I ever came up for office. I said, ‘No, each man in the audience thinks he is that one in the block. So they will all take it as a compliment.’ But, however that may be, public sentiment is made up of a few people. When a masterpiece is produced by the painter artist, who knows that it is a masterpiece? The great art critic of the last century is called in and he looks at it and he sees it is a masterpiece. Ruskin sees it and knows it and he brings in another, and finally twelve, maybe, see in it the masterpiece, because they are capable of judging it. And the opinion of these twelve slops over and finally becomes the universal opinion of all mankind. And so it is, and so it always has been with the learned man, and on a larger scale a collection of learned men in a university.

Now, I can say no more or you will think I am growing loquacious. So I will say nothing more but express again my good-will to this University and the feeling of pleasure which I have in coming here as Mayor to assist in the installation of your new Chancellor.”

RESPONSE FOR THE EDUCATIONAL FOUNDATIONS

ELIHU ROOT, LL.D., '67, TRUSTEE OF THE CARNEGIE INSTITUTION; CHAIRMAN OF THE BOARD OF TRUSTEES OF HAMILTON COLLEGE; SENIOR UNITED STATES SENATOR
FROM THE STATE OF NEW YORK

“Mr. Chancellor, Your Honor, Excellency, Ladies and Gentlemen: It is interesting that the name of Elmer Ellsworth should come to be the head of the institution which

half a century ago was made famous by Theodore Winthrop in *Cecil Dreame*.

Notwithstanding the manly and vigorous voice that we have heard this morning from the far distant past, there are not many left under the sun who remember *Chrysalis College*, in the fine gray old collegiate Gothic building on Washington Square. As I look back to it as it was in the early sixties and recollect the conditions which existed then, the conditions of the University of the City of New York, of the boys' schools, one called *Columbia* and one the *Free Academy of the City*, and look across the long distance of time and see what there is now, I am deeply impressed by the fact that there has been a firm, steady, uniform, progressive development of the educational institutions of our country. There has been much free will for Presbyterianism to lay hold of, but there has been more foreordination imposed by the genius of free government, the natural and necessary development of a free, self-governing people. The multitude of impulses to promote religion, to minister to personal vanity, to advance the fortunes of individuals, to add honor to localities, to promote the development of particular branches of science; all the great variety of impulses which have led individuals to establish educational foundations, have been working out results, quite independent of the purposes, and forecasts of the individual founders. This myriad of impulses, coming from individual will, has been molded by the genius of a self-governing people into a system out of which gradually are emerging systematic results. It has seemed as if our educational institutions have had little or no policy. Indeed, they have had but little consciousness of an intentional policy. They have been following the course of their destiny, driven on by forces not understood by any man at their head, or even all of them put together. Gradually we see emerging a differentiation of our educational institutions. The old-fashioned college, the institution, however, it may be improved and developed from the germ of the old-fashioned college into the place of training for the whole man to make him ready for whatever comes in life, is a separate class from the vocational institution, broadening and taking in its thousands of students, filling their many separate desires to fit themselves for separate and special vocations in life. Now come the foundations designed for the enlargement of knowledge without immediate and direct relation to the instruction of youth, designed to relieve the men engaged in instruction from the

increasing duties of research, represented by the Carnegie Institution of Washington, which is one of the institutions I have the honor to represent here, so that research may be prosecuted, knowledge broadened, and excursions into the field of human possibilities undertaken far beyond the possibility of the institution whose first duty is to teach. As the multitude of the founders has increased, the spirit of the foundation has spread, and while Dr. Brown comes here from the western universities, he comes not from an alien system. The spirit of John Harvard and Elihu Yale and Eleazer Wheelock and Samuel Kirkland and all of that old and honorable list of men, who, centuries ago, devoted their substance and their prayers to the foundation of liberal centers of learning in our country, has spread through the multitude of donors, through the army of instructors, until it has permeated the great body of the people and through all the great West that spirit is interpreted by the people at the polls, who have established the great State institutions and are now sending back their sons and men of their training to broaden and invigorate the expression of that same spirit in the older institutions. The western State Universities of Wisconsin, Michigan, Illinois, California and all the rest are the same thing that the individual founded long ago in the East expressed through the multitude who constitute government.

I cannot stop without saying one word of a contribution made to this University by the other educational institution which I represent here to-day, Hamilton College. Forty-five years ago, John Norton Pomeroy, of the class of 1847 of Hamilton, was at the head of the University Law School, and he was one of the few men who gave the impulse that has made the university what it is to-day, a noble, able, devoted, self-sacrificing instructor. A conspicuous illustration of that highest of all functions of the teacher, in that he presented to the young men of his time, the spectacle of a life made happy without wealth, without office, without any power except the power of natural sympathy, and with no reward but the joy of continually seeking and finding truth.

Chancellor Brown, I am sure that I can say for all the educational foundations of our state and our country, that you will find in them, in their officers, their friends, and their alumni, that sympathy and support without which no human power avails. In the republic of letters it is especially true that no man gains by the downfall of another. It is all up and none down, because schools of learning are

participators in the wealth of all learning. There are no Tripolis in the education of the United States. I extend to you continual sympathy, comradeship and God-speed."

RESPONSES FOR AMERICAN UNIVERSITIES

HARRY PRATT JUDSON, LL.D., PRESIDENT OF THE UNIVERSITY
OF CHICAGO

"It is with especial pleasure that I congratulate the new Chancellor on his induction into the administrative headship of an institution of learning situated in a great urban community. The obligations of a university under these conditions are of peculiar importance at this stage in the development of our country.

We must bear in mind the two-fold function of any university—the discovery and the dissemination of truth. The emphasis to be placed upon these respective parts of university duty and the content which may be given to each of these parts may well differ according to the location of the institution. In a great city with its crowded population, the limits of the university duties are to be conceived as co-terminous with the limits of the city itself. In other words, the university should not be content with the discovery only of scientific truth, which may have most direct bearing upon the city life, but should be especially industrious in the investigation and dissemination of such forms of truth as are directly related to the city. In this sense, in the first place, the university should be a repository of all such knowledge as may be needed by any branch of the city government—economic, political, scientific, educational. The university gathers within its walls a great body of experts in all these fields. The knowledge amassed in the university library and museums, and especially as energized by these groups of experts, should always be at the service of any branch of the city government. This of course does not imply that the university takes part in such political activities of the locality as might divide different portions of the electorate. It does mean, however, that all questions that have to do with fact should be susceptible of immediate and comprehensive answer within the university walls.

Of course, this same thing should be true also as related to groups of individuals. Organizations aiming at any humanitarian or economic purpose should be able to find within the university the solution of their various problems.



SPEAKERS OF THE AFTERNOON EXERCISES LEAVING LIBRARY TO JOIN IN THE PROCESSION
Right to left: Chancellor Brown, Borough-President Miller; Mayor Gaynor; President James, University of Illinois;
President Judson, University of Chicago; Chancellor Kirkland, Vanderbilt University; President Woolley,
Mt. Holyoke College; Lord Rector Andrew Carnegie; Ambassador Bryce.



THE SPEAKERS OF THE AFTERNOON EXERCISES AWAITING MOVING OF PROCESSION
Right to left: Chancellor Brown, Borough-President Miller, Mayor Gaynor, President James, President Judson
President Woolley, Dr. Carnegie, Ambassador Bryce, Judge Riddell, Dean Stoddard.

In short, the university should be a storehouse of knowledge for the use of the city in all its complex activities, and should have that knowledge in such shape as to make it immediately available at any time.

Further, an urban university has the very great advantage that it may use the city as a great laboratory for all its departments. This is true not merely of the manufacturing and commercial industries which every city supports. The economic and sociological departments of a university have a very great advantage in the means of study afforded by an urban population.

Thus an urban university has very peculiar advantages and very peculiar obligations. There is need, I am sure, in every large city of all the resources which can be afforded by all the universities which are, or are likely to be, established within urban limits; and therefore the New York University may share in one of the great works of the world."

EDMUND JANES JAMES, PH.D., LL.D., PRESIDENT OF THE UNIVERSITY OF ILLINOIS

President James responded on behalf of the State Universities. Unfortunately, owing to an oversight, a copy of his address was not secured for insertion here.

MARY EMMA WOOLLEY, L.H.D., LL.D., PRESIDENT OF MOUNT HOLYOKE COLLEGE

"Mr. Chancellor, a ceremony such as this to-day is in the nature of a coronation, to which we come as ambassadors. The Colleges for Women appreciate the honor of bringing a greeting and rejoice in the opportunity to wish for you a realization of all the high hopes for the future of this University, inspired by what it has already accomplished, by the promise of even greater achievement in the coming years, and by confidence in you as a leader.

Every thoughtful observer of English life and conditions last summer must have been impressed by the dramatic contrast between the pageantry of the coronation and the stern realities of ruling, which followed with such startling swiftness. Academic monarchs, Mr. Chancellor, have much the same experience. To-day, brilliant festivity, congratulation and acclaim—to-morrow the shouldering of heavy responsibility. This responsibility is heavier to-day than it

was yesterday, will be heavier to-morrow than it is to-day. To train the youth of the country for 'employment in church and public state' was not as complicated a matter in 1701 as in 1911. And as the task becomes more difficult, in like proportion does the need become more imperative. The country has a right to make a high demand of our colleges and universities, in this age of perplexity and complexity, a demand that they shall train *men*, in the broadest definition of that word, not invariably scholars—it is doomed to disappointment if that is the expectation—but thinkers and workers, efficient, high-minded, sound in body and mind and soul, with a sense of responsibility for the common welfare. Nor is this high work for humanity exclusively the province of the colleges for men. All over the world there is a great sense of quickening in the social conscience, a great awakening in regard to the place and mission of women, in the body politic, in the body social, in the body religious. As representative of the women's colleges, I bring greetings from the institutions which have a responsibility not unlike that which is resting upon the undergraduate colleges for men, the responsibility of training *human beings*, not for any one special vocation, but for life, with physical and mental and spiritual powers so developed and disciplined that they are ready, wherever placed, to meet demands and master problems, to think straight and see clearly distinctions, intellectual and moral, and to live with the courage of their convictions. The particular vocation is incidental as compared with the larger issue. Efficiency and vision, there is no sphere of life to-day in which they are not needed, and the problem of the undergraduate college for women as well as for men is how best to meet this need.

Our greeting to you, then, Mr. Chancellor, is one not only of welcome and of good wishes for you, of congratulation for the University which has chosen you as its leader, but also of congratulation for ourselves, that your wide experience and high standards are to be devoted to the solution of the problems and the realization of the ideals of the American college."

JAMES HAMPTON KIRKLAND, PH.D., D.C.L., LL.D., CHANCELLOR
OF VANDERBILT UNIVERSITY

"I have been asked to say a few words as a representative of educational institutions founded by churches or private individuals.

The classification of institutions suggested by this request is, I trust, not very significant. There are differences in universities known by the distinctive titles of urban, state, church, or independent, but the points of agreement are larger than the differences. We may vary in origin, or in the sources from which we derive support, but the ideals, methods and agencies of our work are largely identical. The great educational forces of our whole country are one, and move as a unit in onward sweep and power. Perhaps the classification made is, after all, only a subterfuge for the selection of speakers, an expedient by which all voices may be heard, united in one grand chorus of acclaim on this joyous and auspicious occasion.

So I shall speak with as little regard to my constituency as a United States Senator after he has been elected to a long term. But if I tarry one moment by my supposed subject, I would pay a tribute to the religious agencies of this country for constant and abiding interest in educational enterprises. This influence was potent in the founding of Harvard, of William and Mary, and of all our earliest institutions. Some of these foundations have passed completely into the hands of independent boards; over some the churches still exercise a direct control; with others there is maintained a sympathetic union, a relation of historic interest and friendship, advantageous to both sides. But the one lesson taught by all this history is the vital connection between culture and character; between man the worker and man the thinker; between making a living and making a life; between mind and soul whose full accord is essential to that vaster strain whose swell shall encircle the planet. If this lesson is ever forgotten—which I consider most unlikely—the memory of our educational history should call us back to true ideals.

I bring to you, Mr. Chancellor, on this occasion the cordial greetings, the friendly congratulations, the sincere good wishes of a large number of colleges and universities. In these expressions of admiration and affection we are one. Your speaker comes from a long journey, the dust of the distant highway is on his garments. From the whole South, especially do I bring on this occasion personal and official greetings to you and to your institution. We remember gratefully your labors and ministries as leader of our national educational forces. With confidence we wait as you now lay your hand to new tasks. By the history of your own institution you are committed to an era of achievement

and success. Educational workers everywhere have watched with admiration the growth of this University in the past score of years. This campus, these buildings, these crowds of students, sound the praise of one name. The retiring Chancellor has founded here a Hall of Fame whose tablets record the names of our greatest citizens. At the same time, he has builded himself a monument, more enduring than marble, in this institution, which he has lifted to such a high field of useful service. If you wish his monument, look about you.

The tasks set before the trustees and officers of this institution are indicated in its very name. Some universities bear the name of their founder, or of a great benefactor; others, the name of the city or the state that maintains them. But this institution has taken the name of the great metropolis, which has been chosen as the field of its labors. You are baptised into your life-work, consecrated to your service. In common with other similar institutions, you must stand as a living protest against the absorption of energies in material production. In the marts of the world you lift up wisdom's cry. Where the nations surge to and fro, each individual elbowing and jostling his neighbor, in the midst of eternal strife and struggle, you must stand firm in the strength of a great ideal. In this great world city, you must uphold the great world forces of light, of truth, and of knowledge. These are, after all, the eternal forces; and it is for this reason that institutions of higher learning are immortal. They live in great discoveries that create a new heaven and a new earth, in society uplifted and the Kingdom of God descending to dwell among men. We who labor in such enterprises measure not our task by material standards, but in terms of spirit life. All nature is our temple, all truth our creed, all men our brethren, all the world our field, and all time our life period. Parties may pass and repass, kingdoms wax and wane, cities rise and crumble into dust, but the work of universities will abide. They write their names in stars of light, they leave their story in records that never die.

May it be your privilege, Mr. Chancellor, to preside for many, many years over the destinies of this University and through this instrument of service to lift our greatest American city to a higher and richer life."

RESPONSES FOR FOREIGN UNIVERSITIES

JAMES BRYCE, O.M., D.C.L., LL.D., BRITISH AMBASSADOR; HONORARY FELLOW OF ORIEL AND TRINITY COLLEGES, UNIVERSITY OF OXFORD

"Mr. Chancellor, Mr. Mayor, Ladies and Gentlemen: The privilege and the honor has been allotted to me of representing on this occasion the universities of other countries. I will not use the word 'foreign,' because that word would not apply to the universities which are more particularly represented here by my friend, the member of the Senate of the University of Toronto, as well as myself. We do not answer to the name of foreigners. Moreover, what has been said already by my friend, Mr. Root, is true. There is no distinction in respect of language, or tongue, or country, or form of government, between those institutions which are all devoted to the same high purpose. It is a particular pleasure to me to be the bearer to you, Mr. Chancellor, of congratulations and good wishes in the fulfillment of the duties that you are to discharge here, because it has been my privilege to know you in Washington, and to know what experience and what breadth of view in all educational questions you will bring to the work that awaits you here. It is a further pleasure, having seen for the first time the site in which this University is located, to be able to congratulate you all, Chancellor, and faculty, and students upon the splendid position which your buildings hold, looking out over this great populous region and on to the distant hills, where nature presents to you that amplitude of view that a university ought to bring to all human problems.

To be asked to speak for the universities of the European Continent as well as of England and Ireland, for I leave Scotland and Canada to my two friends who represent them, the Lord Rector of Aberdeen, and the member of the Senate of the University of Toronto—to be asked to speak on behalf of the universities of Europe, would be indeed a grave responsibility, if it were possible for me at this time to say anything worthy of such a long line of famous institutions, beginning from the school of medicine and the school of law in the University of Salerno and the University at Bologna in the eleventh century, and going on thence to the wonderful University of Paris, the greatest intellectual force in the Middle Ages, and all the other universities of Italy and Spain and those of Germany, from the University of Prague,

down to those German universities of the eighteenth and nineteenth centuries, which have so largely helped to make the new German Empire. Of these I will not venture to speak, but will only add that I have been specially commissioned by the Vice-Chancellor of the University of Oxford to represent it here, as my own university, and to say that that older sister of yours—now eight hundred years old, but nevertheless, as hale and energetic as she ever was before—sends you her greetings and is glad to express her sympathy for your rising and expanding fortunes. She and all of the universities of Europe have the same common mission which you have, and there is nothing but friendly co-operation and sympathy between us all. As was said with equal force and truth by Mr. Root, there can be between institutions dedicated to learning and science no envious rivalry, nothing but a desire on the part of each that all the others shall flourish, because the good of each is the good of all. Our mission is the same now as it was in those early centuries, when the University of Oxford arose. In some ways the work that had to be done then was rather easier than that which stands before you and us now. The head of my college in Oxford, which was founded in the fourteenth century, and his colleagues in the headships of the other colleges of those days, were supposed to have done a great deal for their colleges, and built themselves a permanent name in their annals, if they had traveled to Italy and brought home a copy of a manuscript, probably of some work of St. Augustine or of Cicero. They were not expected, as you presidents and chancellors of American universities are expected now, to go about raising funds to build a new laboratory, or perhaps a new stadium. There was no trouble in those days about providing dormitories and lecture rooms, because the teacher lectured wherever he could find a place, possibly at the side of the street, and the students slept wherever they could find a roof to cover them. There were no elaborate organizations in those days. Everything ran itself, and there were fewer worries, especially about funds, and the presidents and professors of those days were not obliged to spend the best part of many a working day in sitting upon Boards and Committees. Modern universities have lost as well as gained something by the completeness and minuteness of the organizations they have created. Nor in those days was it necessary to take much trouble to find pensions for teachers who were retiring or who ought to retire. That difficulty has now been splen-

didly met by the munificence of one of our friends on this platform, who never did anything better for universities or the world than when he made his great educational foundation. In those days the problem was simple, for there was nothing to do but tell the teacher if he was getting a little past his work, that the time had come for him to retire into a monastery. There were plenty of monasteries at hand and as he was presumably unmarried what could suit him better? The main problem before every university is still the same now as it was then, to collect knowledge and to advance knowledge and to stimulate youthful minds, but there was a great difference in the attitude of youthful minds toward knowledge in those days. Universities were then like a few lamps twinkling amid the encircling gloom of ignorance which overspread Europe. Nowadays knowledge is everywhere. Knowledge of a sort is so diffused that people have come to think it cheap. Knowledge is like a diffused light spreading from the sky down over the whole world, even if it is for most people somewhat dim and hazy. And there is so much knowledge of the hazy kind, and every one is so fully persuaded that he is in possession of what he wants of it and there are so many voices and pen-making things doubtful by their divergences that many people seem to have almost lost their interest in truth in the difficulty of discovering it amidst the enormous variety of fluctuating and discrepant opinions. This has made the task of the university not only more difficult, but more important than it ever was before, because the universities are the places where knowledge needs to be tested; where knowledge ought to be made thorough, and above all, where knowledge must be studied in the right spirit. In the Middle Ages, when there was so little knowledge, and it was so hard to get, there was an eager passion for it, which brought men from the farthest corners of Europe to the place where any famous teacher could be listened to, and made them hang upon his words, and nerved them to bear all hardships and sacrifices in order that they might obtain the precious gift of knowledge from his lips. But now the passion and eagerness seems very largely to be devoted to getting that kind of knowledge which is most useful not for mind and soul but for practical success in life. And so we feel in Europe—perhaps you too may feel it here—we feel in Europe that one of the chief things that the university is called upon to do, is to insist that although it is its duty to give instruction which shall fit men for all the prac-

tical business of life, qualifying them to do their professional work in the best possible way, upon the basis of the most accurate knowledge, still that is not the highest duty of the university, nor the duty in discharging which they will do most to help forward the progress of the world. The gainful occupations will take care of themselves, but the universities are especially called upon to hold up the highest ideal of the pursuit of knowledge and truth for their own sake. They must make men feel not only that the physical sciences will best advance and develop when they are studied in the abstract and in theory as well as with regard to their practical application, but also that truth is to be sought simply because it is truth whether any material benefit will or will not follow. The spirit by which discoveries are made, and the spirit which makes teaching stimulating and ennobling springs out of a disinterested love of knowledge and truth for themselves. This is the characteristic function and duty of universities. They are called upon to resist the pressure which is often put upon them to confine themselves to a narrow practical view of knowledge and of the intellectual aptitudes which serve gainful ends. The American universities, I am happy to think, have shown themselves alive to their duty in this respect and are most of them doing all that can be done to maintain the ancient and splendid ideals which inspired the universities of Mediæval Europe. You here in this great city have got an immense field open to you. Your mission in this vast commercial city is the same as we have in the cloisters of Oxford. It is a glorious mission with which the welfare of our race in our respective countries is bound up, and we here from our antiquity of eight hundred years, express to you our sympathy and our hopes, and wish you all success and prosperity in your work, a success and prosperity commensurate with the greatness of the city in which your lot is cast."

ANDREW CARNEGIE, LL.D., LORD RECTOR OF THE UNIVERSITY
OF ABERDEEN

"Ladies and Gentlemen: The home authority, responsible for my gorgeous robes upon this occasion, evidently thought that I should best promote the—what shall I say—the happiness of the family, if I were seen and not heard. The last three or four days I have been bearing my blushing honors thick upon me. There came the message from Aberdeen: 'You are elected Lord Rector of Aberdeen,



AFTERNOON PROCESSION—SPEAKERS ENTERING THE HALL OF FAME

Left to right: Chancellor Brown, Mayor Gaynor, Borough-President Miller, President Judson, President James, President Woolley, Chancellor Kirkland.



A HALT IN THE AFTERNOON PROCESSION

Last five persons: Chancellor Kirkland, Ambassador Bryce, Dr. Carnegie, Dean Stoddard, Judge Riddell.

without a contest, no opposition.' Mr. Mayor, that is the kind of a candidate you should select for an election. When you want a candidate next time for a position that has great honor and little labor, one that can get a walkover, I suggest to you I might be worthy of your consideration.

It is not customary in presenting addresses in Europe to accompany them by words. The oration is supposed to be within the roll presented. Therefore, my guide suggested that we should have the very telegram apprising me of my authority to act here to-day as Lord Rector for the first time—Mr. Chancellor, you are quite right—I trust it is not for the last. Herein (indicating a letter receptacle) is contained the identical message flashed across the Atlantic, three thousand miles under sea, giving me the great honor of being present here in my official capacity and this address, sir, I beg to present to you, hoping that it may be placed among the archives of your University, to show to future generations, centuries hence, that there was a University of Aberdeen, and that there was a young man named Carnegie, who was Lord Rector, and that his wife had the good sense to preserve the message, and that it was handed over to be held among the archives of this University, when it has a thousand years more added to its age.

I venture to say this for Aberdeen, and I know I express the sentiments of every one connected with it, that they have watched the history of your university, not with less favor, since it was known to have a little smack of Presbyterianism in it, for which we Scotch folks are remarkable. We trust, sir, that this University of Aberdeen, which already boasts four hundred years' existence, will double and treble this for it is that institution which more than any other university, even in Scotland, I believe, deserves to be remembered, and celebrated for the fact that its students cultivate literature on a little oatmeal. It is a poor university, as far as means are concerned, but it has a record, and the struggles that young men subject themselves to there, to earn its degrees, are indeed a daily wonder.

Let me tell you about Scotch universities. You know I gave them a gift, and I said to them that they should help struggling students and advance the fees of those who were worthy, but if in future years any of these students were successful and wisht to repay the advance made, not as a debt, but as a proud honor, I think in doing so they will be showing the love of independence so dear to the

Scot. Let me tell you it is only five years since that trust began. Last year I got letters from about fifty students; they sent me copies at my request, and they had paid back over fifteen hundred pounds (seventy-five hundred dollars) of the fees advanced, and this next year, so I am told by the actuaries, they believe that twenty five hundred pounds (twelve thousand five hundred dollars) will be returned by these poor students; and when I read their letters, wasn't I proud of my Scotch blood!

Mr. Chancellor, I beg to assure you that your elder sister university has watched your career; that it hopes you will still be engaged in the common work of leading the human race upwards—for all the centuries to come."

HON. WILLIAM RENWICK RIDDELL, F.B.S., LL.B., L.H.D., JUSTICE OF THE KING'S BENCH; MEMBER OF THE SENATE OF THE UNIVERSITY OF TORONTO

"Mr. Chancellor, Ladies and Gentlemen—I feel peculiarly complimented upon being asked to address you this afternoon. I have not the very great advantage (*teste* Dr. Draper) of being born on a New York farm; but I did the best I could. I was born on a farm on the shore of Lake Ontario, almost in sight of the State of New York; and after I came to years of manhood and was dignified by the grant of Her Majesty's patent as one of her Counsel learned in the law, I had the pleasure on more than one occasion of representing this great State of New York in Her Majesty's Courts in my native province, thereby assisting to distribute the wealth of this State. And yet, while I feel highly complimented, 'nevertheless, I have somewhat against thee,' I am not wholly satisfied. (That is, however, the normal condition of a Canadian.) I do not complain but am proud indeed that I have been associated with speakers such as we have heard this afternoon, and especially that I have been associated with two brother Scots, one of whom continues, like myself, to be a British subject—and the other was once a British subject. I am placed beside my friend, Mr. Bryce, who is distinguished as statesman, historian and scholar, and Dr. Carnegie, whom I am proud to call friend, because he is the friend of all who, like him, are followers of the Prince of Peace. But what I do complain of is very much what was indicated by Mr. Bryce—that it is as a representative of a *foreign* university that I am presented. Now, I am a Canadian to the last drop of my blood. I was born under

the British flag, and I come from a Canadian university; but there is no Canadian, at least no English-speaking Canadian, who considers himself a foreigner in this city or in this State. It is true that we are living in a land over which floats another flag, whose colors, red, white, and blue as they are, are differently arranged from the same colors on yours; and therefore from the standpoint of international law, we are aliens. It is true that it is the great nation across the Atlantic with which we in Canada are bound, politically and by that bond stronger than a band of steel, the bond of affection and ardent loyalty; but in all else we are to a great extent a part of the continent to which we belong. We are intimately associated with the people of the other part of that continent, both socially, commercially and financially; and why should we not be?

It is not in a physiological sense alone that 'blood is thicker than water'; and we are descended from the same ancestry. We have hundreds of years of history in common. Our language is the same. We all claim as our very own, Shakespeare and Milton. Our laws are almost identical; our institutions are similar. We have the like aspiration for liberty and justice, truth and righteousness.

From the Atlantic to the Pacific, for thousands of miles, stretches the longest international boundary on the face of the earth, and on neither side is there a fort which is more than a glorified farmhouse, a fortification which would not remind us children of the farm like you, Mr. Chancellor, and myself of the root house which used to be found upon every farm. We are pursuing our destinies in peace, side by side, working out our destiny in our own way. Our inland waters, pure as the heavens their source, bear the commerce of two peoples of one great race, one people, great now, and the other aiming to be great and determined to be great; but these pure waters are not polluted by any armed navy, or by any armed ships, except such as are sometimes heard of on political platforms, but never seen in war. It is for that reason, among others, that I am proud to be here.

Let no man suppose, let no man be persuaded that that good will which has prevailed between the people on this side of the international boundary and those on mine has been but on the surface, that the little storms on one side or the other have done more than clear the air and make the calm more grateful and serene.

And let no man be persuaded that the recent events in

Canada have any significance as indicating any diminution in the kindly feelings of my people toward yours.

The history of the commercial relations, the trade relations between the people of the United States and the people of Canada, either alone, or the people of Canada taken with their mother country across the Atlantic, has been a comedy of errors, in some instance almost grotesque. From the beginning, what one people wanted, the other refused, and when that other came around to a different view, then the first had also changed; and they were again at cross purposes. This whipsawing—I think that is the academic term—this whipsawing was expected to be brought to an end by the Elgin Treaty of 1854; but that was denounced in 1866, largely to punish the mother country vicariously through her daughter upon this side of the Atlantic; an easy method of dealing with a strong power. Then Canada, over and over again, urged the United States to grant her a renewal of the agreement. Her envoys were sent again and again to Washington. For sixteen years upon her statute book was a standing offer of reciprocity. Do not fear—I am not going to talk politics. As often as the envoys came they were received, sometimes graciously, sometimes the reverse; but their efforts ever were wholly in vain. At last Canada decided she would ask no more. With infinite labor, with infinite pains and splendid courage, of which I am proud, Canada forged out for herself new avenues of trade and new means of revenue, proving herself no unworthy daughter of the nation across the sea, a sister not unworthy to stand side by side with the greater and older and richer brother to the south; and when at length she had achieved to a certain extent that kind of trade independence which she desired and to which no other country is more entitled—for no country ought to be more independent—then came that overlong-delayed proposal. The majority of Canadian voters decided they were satisfied with things as they were. Forty-eight per cent. of the million and more who cast their ballots at the recent election thought they would like to accept the offer which had been made and made in good faith; fifty-two per cent. thought otherwise. Had three per cent. changed their views the result would have been different. Now I do not adduce that as any evidence of what I have been saying, that there has been no change of feeling. It has no significance one way or the other.

But it takes two to make a bargain. Canada is mistress

in her own house; and the American people would be the very last people on earth to desire to force anybody into a bargain simply because the American people desired to make it.

No more was ill feeling manifested by that election, or by the result of that election, than there was ill feeling in the heart of Americans toward the Canadians during the sixteen years or more in which we were making a standing offer of reciprocity, and in the many years in which our envoys were seeking from you a renewal of the treaty.

Now, let me not be misunderstood. I admit that there is in some parts of our Dominion an occasional individual who calls himself and perhaps believes himself to be a hater of the United States; but then I am informed that there are still in some remote parts of this great union some who believe they are haters of England. If there are some on our side of the international boundary—and they not always 'lewd fellows of the baser sort'—who like to take a shot at the American Eagle, the lion's tail is not wholly safe in some parts of your country.

We are intimately associated, sir, in educational matters as in all else. Our common or public school system in Ontario was based upon the common school system of Massachusetts. Our universities have taken much the same course of evolution as your universities upon this side of the line. True, in the University of Toronto, from which I have come, there are three separate arts colleges, each having its own faculty and its own senate, but the reason for that is historical; and the other Canadian universities in general have not that peculiarity. If I were to be asked, I would say that the University of Toronto in all else is more like a large American than a large English university. We have separate departments, faculties, post-graduate courses, college of medicine, and so on, and so on. We are pursuing the same end through much the same methods and by much the same means—or want of means, because our university, like every other university that is worthy the name, is poor and cannot get enough money. We have not yet in Toronto a Doctor Carnegie, although we are hoping to have one before the century is out. And our universities send their graduates to this side to fill the chairs in American universities, and we draw from American universities to fill our chairs; and there is nothing which you can do, there is nothing which can affect the university or university education or teaching in this great Union which

will not have its effect upon the University of Toronto. I do not mean simply indirectly and by the influence which the university would have upon the people of the United States, through them upon the people of Canada, through them ultimately upon the University of Toronto; but I mean more directly, for in view of the solidarity of learning in the kingdom of letters, nothing can be done by one sister, one subject, which will not affect, beneficially or the reverse, the other.

And it is for that reason, Mr. Chancellor (but not alone for that reason) that we are glad that you have accepted the dignified and honorable position to which you have been designated. We are glad that New York University will not be checked in that high career which it has begun and in which it has for so many years been running. We hope and expect and believe that her future will be brighter even than her past. My friends, it was no shoot from a wild olive which was to-day grafted into this university. (I use the word 'graft' in the horticultural and not the political sense.) It was no shoot from a wild olive, as my friend, the Chancellor, said, but it was a scion which came from the very olive tree of Pallas Athene, beloved of Athens. No such disaster has happened as when the Persian invasion overwhelmed the City of the Violet Crown and burnt the sacred olive of the Goddess of Learning; it was, indeed, feared that the like had happened when Chancellor MacCracken resigned his position; but we hope and expect that as that tree sent forth a shoot immediately after the retreat of the Barbarian, which spread and spread and spread and became a great tree, so you, sir, will be the new tree, the new root from which a new glory will arise in this university.

We upon the other side of the boundary look upon you in the United States, and in the universities of the United States and in this university, not simply as neighbors and friends, although that we believe you to be, not as distant kinsmen or cousins, but as brethren; and we grieve with you over your failures and we rejoice with you over your successes. We watch with a brother's interest the experiments which you are making in education, as in everything else. We are proud of the position which you have taken and are taking and are to take in the world of learning, and we look upon these acts and achievements of yours as the acts and achievements of our very brethren—and if I correctly understand the feeling of my university, I say it is

the prayer of my university, as it is my prayer, that in this university there will be no backward step, but ever a pressing onward and onward toward the perfect day.

I bring to you the greetings and best wishes of the University of Toronto, and the other universities of the Dominion of Canada. I hope the best for this university: and the highest hope can go no higher than this: May the Chancellor be worthy of his university, and the university be worthy of its Chancellor."

THE INAUGURAL DINNER

The Inaugural Dinner was held in the Grand Ballroom of the Hotel Astor, at half past seven o'clock, and was preceded by an informal reception to the Chancellor and guests. More than two hundred visiting delegates and guests and six hundred alumni were present. The delegates and guests were seated with representatives of the Faculties and Council, at small tables next the Speakers' table; the alumni were seated by schools and classes. The invocation was pronounced by the Rev. Nehemiah Boynton, D.D. The souvenirs of the dinner were particularly appropriate consisting of a violet-covered book containing half tones of the seven University Chancellors, and of sorbet boxes in the form of a clump of violets. Reinald Werrenrath, '05, was present with a double quartet of University singers and led in the singing of the college songs. An especially pleasing feature of the musical program was the singing of the respective college songs immediately following the addresses by the various college representatives.

ADDRESSES

DR. GEORGE ALEXANDER, President of the University Council, acted as toastmaster and introduced the speakers as follows:

"Members and friends of New York University, honored guests, ladies and gentlemen: If the festivities of the evening are ended, the solemnities may now begin.

You men who call New York University Alma Mater, can appreciate the embarrassment of an alien forced into undue prominence in the exercises of this memorable day, by the accident of office or the grace of longevity. The best that I can hope, is that you will regard my failure to

graduate at New York University as a youthful indiscretion, which may be partially atoned for by post graduate service.

The duty devolving upon me is a very simple one. I have to propose now the first toast of the evening and ask that you arise and drink to the health of the President of the United States."

[Toast to the President of the United States.]

"I have now the pleasure of reading a letter from the President.

THE WHITE HOUSE, WASHINGTON, D. C.,
October 28, 1911.

MY DEAR MR. KINGSLEY:

I have your letter of October 26th, and regret that my engagements preclude my attendance at the inauguration of Dr. Brown as Chancellor of New York University on November 9th. The government lost a faithful and valuable public servant when Dr. Brown resigned as Commissioner of Education, and the New York University is to be congratulated upon securing the services of so able and distinguished an educator.

I send you my best wishes for the success of the installation ceremonies.

Sincerely yours,
WILLIAM H. TAFT.

I have also to read a message sent by the Bureau of Education at Washington, with which Chancellor Brown has so recently been connected.

The Commissioner of Education and the entire staff of the Bureau of Education send hearty greeting and congratulations to you and to the University upon this auspicious occasion, and best wishes for a most successful administration.

P. P. CLAXTON, Commissioner."

[Numerous other letters and telegrams were received but could not be read because of lack of time.]

"And now it is my privilege to present to you the man who is the occasion of all of this disturbance to-day. He described himself this morning as a wild olive. He will be tame enough before we get through with him. Allow me to present to you Chancellor Elmer Ellsworth Brown."



AFTERNOON PROCESSION LEAVING THE HALL OF FAME AND MARCHING TO THE LIBRARY
Right to left: Chancellor Kirkland, President Woolley, Dr. Carnegie, Ambassador Bryce, Judge Riddell, Dean Stoddard.



PROCESSION ENTERING THE LIBRARY FOR THE AFTERNOON EXERCISES

ELMER ELLSWORTH BROWN, PH.D., LL.D., CHANCELLOR OF
NEW YORK UNIVERSITY

"Mr. Toastmaster and all the rest of you: My particular function to-night is to abstain from making a speech. This affair has been arranged by the alumni of the University, and it is perfectly well understood that what the alumni wish to-night, after all of the indulgences of the day, is to hear from the men not connected with New York University, who represent the friendly relations that we are fostering with other institutions; and so the New York University man is going to try to get through in a very short time.

Let me say to the Alumni that I congratulate you upon the success of this affair this evening. It is no secret, I think, by this time, that it is a very enjoyable, and a very bright, and a very successful affair. The word has been passed around freely here at this table, so I think I am giving nothing away. I congratulate you, and so far as I have a right to claim any part of it, I want to thank you very heartily.

There is one announcement of policy that I should like to make on behalf of the Council of the University, of which I chance to be a member. We are not announcing many policies in advance, but the time seems to have come to announce one, and it is this:

It has been decided not to conduct the affairs of the University permanently upon the lines followed this week. There is no mistaking the fact that we are having a fairly good time of it, but we don't expect to be able to run the University very long in just this way. Next week maybe, we shall get away from our festivities and get down to the ordinary crackers and cheese of every day work, and we shall be happy to have done so; but we shall be all the happier in getting down to the plain things of every day because we shall have such pleasant memories of these days of this week, and particularly of this day. And now, Mr. Toastmaster, I think the other speakers ought to have their chance."

THE TOASTMASTER: "As the spokesman for the University for the time being, may I ask you men of the University in the manner most approved among you, to endorse my words as I express our thanks to the distinguished guests representing various educational institutions, who have honored us by their presence here to-night.

(Cheers.) One of them remarked to me a few moments ago that he had never in his life sat in the presence of so many brains.

The most venerable of our American universities was nurtured in what I once heard Wendell Phillips call 'the thin air of provincial Boston.' Harvard is represented here to-night, not by her president, but by a member of her faculty, who is among us taking notes; in other words investigating the educational system of New York. I propose the health of Fair Harvard, and introduce Professor Hanus, her representative."

PAUL H. HANUS, B.S., LL.D., PROFESSOR OF EDUCATION,
HARVARD UNIVERSITY

"Ladies and Gentlemen: I have the honor to bring greetings and congratulations from Harvard University to Chancellor Brown, and to New York University upon this auspicious occasion. I regret extremely that it was impossible for President Lowell himself to bring you these congratulations and greetings, because I know how much pleasure it would have given him. I regret it also because I am here among a good many presidents of colleges, and I am nothing but a professor; and in the second place, I am one of those unfortunate persons, who make their best after dinner speeches on the way home, after the occasion is over; and finally, I am only a professor of education—it used to be called 'pedagogy'—a subject which has not yet attained universal academic respectability.

However, I am also delighted that I happen to be the representative of Harvard University on this occasion, just because I am a professor of education. Your distinguished Chancellor, as it happens, began his university career as a professor of education—as a professor of x ; for education as a university study was at that time an unknown and undetermined quantity. Education was a newcomer among university studies, and the representatives of the new study, as well as that study itself, were looked upon with some suspicion, and sometimes almost with aversion. It was one of Doctor Brown's achievements that he helped to allay this suspicion in the two institutions with which he was connected, the University of Michigan and the University of California. His distinguished services in the field which he then occupied helped to make the study of education respectable. I speak advisedly, ladies and gentlemen. Those of you who look upon the activities of the university in the

field of education to-day will scarcely realize what a struggle had to be undergone in order to wring from the university faculties of this country an appropriate and adequate recognition of the importance, the magnitude and difficulty, and the complexity of the problems with which the university professor of education has to deal; and an acknowledgment of the seriousness of that study as a university study.

It is odd, but true, that one of the most distinguished universities of this country established its courses in education, decided what should be taught in them, and then invited the professor to take the chair; and none of the courses could be counted toward a degree. If any students elected the courses in education no harm should come of their misguided interest! Among the things that the professor had to do when he assumed the direction of affairs was gradually to kill most of the courses that had already been decided upon, and to substitute in their stead other courses that seemed to be more reasonable and more likely to be commensurate with his responsibilities.

But I am talking about what is now ancient history. That was twenty years ago. Since that time an appreciation of the duty of the university to study education—that activity on which human progress so largely depends, has been achieved; and there are very few self-respecting universities in the country to-day that are not seriously studying the subject, or that are not preparing to study it.

I am not here, however, to discuss at length the struggle which this new study of education had to find its place among the established university studies. I want in the few minutes at my disposal rather to draw your attention to the new forms which this study of education has assumed.

I suppose there is no subject in the world which has so many specialists as education. I have observed that business men, and lawyers, and physicians, when elected to a board of education or to a school committee, as we say in Massachusetts, immediately become specialists in education. It is not likely that if these men were put on a board for the construction of a railway, or a board for the development of a hospital, or a board for the development of some business enterprise, with the details of which they were unfamiliar—it isn't likely that they would at once develop the specialist's knowledge and express the specialist's judgment in those fields, as they often do in the field of education. That is a strange fact; but the reason for it is not far to seek.

It is fortunately everybody's lot in this country to be educated, to some extent at least. Sometimes a man is subjected to it under compulsion, to be sure; but it is nevertheless his lot. He consequently grows up with the idea that he knows something about education, just as every one grows up in this English-speaking land with the idea that he knows something about the English language. Now, we learned long ago to distrust that general knowledge, and to insist that if a man is to know the English language, he must study the English language, he must practise the English language, he must understand how the English language is to be used and have abundant opportunity to use it. Well, as I said, in the field of education everybody is ready to express an opinion; and unfortunately, until very recently the professors of education and students of education, like all the rest, could rely only on opinion with respect to educational affairs. And to the present day that is largely true. We are, however, trying to learn to put behind opinion established truths. To-day, on most matters of education your opinion is as good as mine; mine is as good as yours, and neither of them is good for much when it comes to using our opinions as a guide for practice. The reason for that is the reason which I have indicated, namely that even as specialists, we are still in the realm of opinion, where the layman's opinion is as good as the professional man's, and the professional man's opinion is no better than that of the layman.

Now, I don't want to be misunderstood; I have exaggerated a bit, of course. It must certainly be true, almost always, that the man who devotes himself to the study of education will acquire opinions that have more value than the opinions of the man who has not studied education. Nevertheless, it still remains true that we are just beginning the development of a science of education. It is only a little while ago that we had no science of psychology; it is now a rapidly developing science. So it has been and is with the formative science of education. Perhaps what I have been saying will be more intelligible if I give one or two illustrations—very elementary they will seem to you; but they will serve my purpose all the better on that account.

If any half dozen people in this room were asked how much arithmetic a boy fourteen years of age knows what would those half dozen people say? If they were asked how well he ought to know it, what would those half dozen people say? If they were asked how much arithmetic he ought to study, there would probably be half a dozen different opin-

ions, and if they were asked how well he ought to know it, there would probably be as many more. My point is this: That since we haven't found out how much arithmetic a boy of fourteen knows, we don't know how much time it takes him to learn it, and we don't know what methods it takes in order to get him to learn it. In other words, we have not experimented in education to establish facts on which we can rely, as the surgeon has experimented to establish the facts on which he can rely; as the engineer has established facts on which he can rely; and as the psychologist is coming to establish facts on which he can rely. My point then is, that in the field of education, one of our problems is the setting up of well-organized, carefully checked, appropriately appraised experiments to settle general opinion.

Let me give one other very homely illustration: If you were to ask your neighbors—any one of you—whether it was a good thing for a boy or girl to study English grammar, you would probably get a variety of opinions. If they were asked also how much grammar the boy or girl ought to know, you would probably get another set of opinions; and your opinion, like his opinion, would be good for little or nothing in determining the question at issue.

Now, how shall we find out? Suppose we have ten schools over here, in which the principals are interested in teaching grammar as well as it can be taught. Over here are ten schools in which the principals are indifferent with respect to the amount of grammar a pupil ought to learn. Suppose those two groups of principals were encouraged to teach the English language, with or without much English grammar, as they prefer, for a series of years; and suppose that during the time that this experiment is in progress—say five years—it is carefully watched; and at the end the results in the use of the English language and the facility with which the pupils acquire a foreign language are judiciously appraised. Don't you think we would know a great deal more about what English grammar is good for than we know now?

These illustrations are very homely and very elementary, as I have said, but unfortunately they indicate new procedures in the field of education, to establish or refute the most elementary, the most widely accepted or controverted opinion. So, we might go on with a variety of other illustrations. We would like to know, for example, whether a board of education consisting of seven members is better than a board of education consisting of forty-six

members. We have gathered in this city, as you know, a large amount of opinion on that subject, and we have really convinced nobody. The only way to find out whether a board of seven is better than a board of forty-six, is to have the working of a board of forty-six carefully inquired into, and a board of seven carefully inquired into; and to do that not in one place, but in a good many. I am using forty-six, because that happens to be in my mind, but take twenty-six, or twenty, or any number you please. My point is that the thing to do is to find out by careful investigation, by inquiry, how a board consisting of twenty-six members works. Find out by careful inquiry how a board consisting of seven works; and do that for a number of places and over a series of years, and set your facts forth in such a way, that he who runs may read.

I don't want to take more than my proper time, Mr. Chairman: but before I sit down, I want to say three things: First, that one of the great obstacles to educational advance in this country, and in every country for that matter, is complacency—self-satisfaction; second, that the way to get rid of complacency, and to make progress, is to set going the habit of self-examination; and third, that in order to get out of complacency and to realize the progress we are after, is to set going well-conducted, well-organized, well-checked, and well-appraised experiments. In that way we shall tend to break up the autonomy which every great school system, and many a small school system acquires, and shall see clearly in education not merely an important routine, but the problems underlying that routine, and work progressively toward their solution. In closing, I wish once more to congratulate this University heartily on its acquisition of Chancellor Brown, and to congratulate Chancellor Brown on the opportunities which the Chancellorship affords him. And finally, I want to suggest to Chancellor Brown that one of the ways in which it seems to me the University can render most conspicuous service to this community and to this country, is so to manage his trustees and the friends of the University, that they will help him to undertake the self-examination, destroy the complacency, and set going the experiments in the field of education to which I have referred. Thus will the University contribute its share, and play an increasingly important rôle in the progressive development of that science of education which we all hope is near at hand."

THE TOASTMASTER: "We most heartily welcome to our



AFTERNOON PROCESSION—THE DELEGATES MARCHING THROUGH THE HALL OF FAME
Honorary Marshal Victor J. Dowling, LL.D., '90; Dr. Fletcher B. Dressler, representing U. S. Bureau of Education;
Assistant Commissioner Augustus S. Downing, representing New York State Education Department.



AFTERNOON PROCESSION—FACULTY DIVISION ENTERING THE LIBRARY
Faculty of Arts and Pure Science ascending the steps; Faculty of Law in the rear.

company to-night, Eli. I propose the health of Yale, Mother of Men, and her President, Arthur Twining Hadley."

ARTHUR TWINING HADLEY, PH.D., LL.D., PRESIDENT OF YALE
UNIVERSITY

"Mr. Toastmaster and Chancellor Brown, Ladies and Gentlemen:—

When I first heard that it was suggested that New York University should take away from the National Government the head of the Bureau of Education, I hardly knew what to do more, to commiserate the Bureau of Education or to congratulate New York University.

In the blanks for information which are sent by various agencies to all of us for the recommendation of candidates for positions, the first question usually is: 'Have you seen the candidate actually at work?' I have seen the candidate actually at work, and I have seldom seen a man who works to so much purpose.

I had occasion not long ago to investigate the scientific work done in various bureaus at Washington. The Bureau of Education was not one of those investigated. On the contrary it was one that helped me in the investigation. But I was impressed with the fact that no other bureau was organized as efficiently as the Bureau of Education, under the gentleman whom we to-day salute as Chancellor. Working with small resources on large problems, he had so ordered the service as to do twice and three times and four times what any of his predecessors had done, and he had so encouraged those under him with his support, that they learned to do the work in the way that he did, and to get results from it. As he takes up the duties of his new position I congratulate New York University especially on the fact that he is a man who not only does but also looks for results.

In the experimenting that we are doing on education to-day, we all of us are tempted to lay too much stress on the process, and too little on the product. Mr. Brown and Mr. Hanus will know best how difficult it is to make our measures measures of efficiency, instead of measures of knowledge or measures of industry. A French essayist has said that virtue is more dangerous than vice, because its excesses are not subject to the restraint of conscience. In educational matters we perpetually have to see and feel the truth of this principle. The industry itself seems so meritorious that there is a tendency to overuse it and to waste it. The

getting of knowledge seems so good a thing that there is a tendency to clutter up the mind with knowledge which has been slowly and laboriously acquired, but which, with the limitations that we all of us know human intelligence has, tends to keep other knowledge out. One of the leading educational authorities says, in discussing the requirements for admission to college, that education in geometry should begin in the kindergarten, and go on continuously; in other words, that it should take twelve years. This is eleven and a half years too much. What can we do with such slowly and laboriously acquired knowledge? Far better to take a half year to train the boy to fix his attention on a subject, to get work done, to be in a position to do things. In after life he will not have twelve years to master his law cases in; he will not have twelve years to decide on the diagnosis of his medical cases. We want to develop not merely knowledge and not merely industry, but mental efficiency. The danger by which we are beset, the danger by which men in the educational profession are more beset than anybody else, is to measure our work by the amount of knowledge gained, instead of measuring it by the amount of power gained.

Gentlemen, I congratulate you that the new head of New York University as an educator merits this superlative praise, that, from the beginning to the end, he knows the difference between a stuffed bird and a live one."

THE TOASTMASTER: "Among the universities represented here to-night, the third in the order of seniority is 'Old Nassau.' Are you all guessing who is going to be her president? Her representative is Professor William Francis Magie, whom it is my pleasure to introduce."

WILLIAM FRANCIS MAGIE, A.M., PH.D., PROFESSOR OF PHYSICS,
PRINCETON UNIVERSITY

"Mr. Toastmaster, Mr. Chancellor, Ladies and Gentlemen:—

When your very energetic secretary, who is also my very pleasant table companion, asked me to speak a few words to you this evening, I at once set about trying to follow his advice as well as I could. I went to a very dear friend of mine who often gives me advice, and I asked him how I could succeed, what I ought to do in order to make this speech and say a few well-chosen words. He wouldn't give me any help at all. All he would tell me was a speech he once heard made by a distinguished man at Oxford. It was

at a public dinner which had lasted till twelve o'clock. Finally Professor Mahaffy, the famous Irish wit of Dublin, was called upon to speak. He was noted for his eloquence. He arose and said: 'Gentlemen, at this time of night the finest eloquence is silence.' I thought that was a splendid lead for my speech. I thought perhaps being a professor I should come on after these distinguished college presidents who are on this list, and I thought perhaps it might be twelve o'clock before I was called upon, so that I could try the same method as Professor Mahaffy. I was pretty sure that if my old friend, the President of Columbia, only could get going before I came on, he would run on until twelve o'clock without much doubt. As that is not the case, and as I have to take the precedence, which comes from my being connected with the third oldest of the colleges that are here represented, I shall certainly have to do something more than that.

As I was sitting in the exercises this morning, several things occurred, several things were said, which raised thoughts in my mind, upon one or two of which I should like to say a word. In the first place, I was shocked by the remark made by your honored, your venerated Ex-Chancellor about the State in which Princeton happens to be, which also is the State in which I happen to have been born, and of which I have been a citizen ever since I was born, the State of New Jersey. He treated that State of New Jersey just exactly as if New York was a first-class European power, and New Jersey was on the other side of the Mediterranean. He annexed the most important part of New Jersey in population, simply in order to amplify the population of the City of New York. We New Jersey men always have felt that curious sensation of being thought of as in a foreign and inaccessible country. It always has seemed to me that to the New York men New Jersey is at an infinite distance; that the Hudson River is not only unnavigable, but a thousand miles deep; that the Palisades cannot be flown over with the best aeroplane and that the salt meadows, if you tried to get over them, are simply impassable. New Jersey is altogether out of your world. When I heard those gentlemen speak who were called upon as the representatives of foreign universities, I felt that I certainly should stand in precisely the same position. In fact, I thought I should represent to-night the only foreign university that would have the privilege of speaking at this table.

But, after all, as the speeches went on, it interested me very much to find in how many respects the history of Princeton and the aims of Princeton and the condition of Princeton resemble those of the New York University. We were started years and years ago by a little body of Presbyterian ministers, mostly Presbyterian ministers, not all, by laymen and others who were of other denominations, but we were started as a protest against the too rigid theology of New England. We were maintained, as the New York University has been maintained, for a long time largely by the support of that great ecclesiastical body, the Presbyterian Church, though we, just as the New York University, have had ever since our beginning the distinction, I think it is the almost unique distinction among the older institutions, of being from the beginning free from any restriction as to theological or denominational connection in our body of students, in the faculty, and in the Board of Trustees. We have always been, as you are, free from any such connection. We have grown, as you have grown, so as gradually to loosen the bonds which connected us with a particular denomination and to make our connection with the general world somewhat more free, somewhat more complete.

And then another thing: Princeton is distinctly a country university. It is one of the things we are very, I won't say proud of, because you can't be proud of the fact that you happen to be in one place rather than in another, but a thing we are very well satisfied with. There are a great many things that are pleasant and good about a country university. All of the professors don't have to be so careful to keep the creases in their trousers. The students don't have to be quite so careful about the way they dress and go about. I think it is a little easier for a poor man probably in a country university, and if we don't have plenty of poor men in our universities, we lose a great deal. Then I think it is a good thing, too, that the country university has its play and its work pretty closely connected. Here on your campus of New York University you have a football field that is a good deal nearer your work rooms than our football field is. Of course it is easier for me to get to the golf links. I don't believe the professors here have quite such an easy time as I do in that respect. But still in this new place, this place upon which you have at last, after so much striving, succeeded in placing your university, in this new place you do have this feeling of being in the country, being in a place where you have room to expand. I tell you

the time has gone by when a German prince could set aside an old palace he was tired of, appoint a dozen distinguished men as professors and start a university. That time has gone by. It is especially on account of the diversity of studies, which need enormous plants, which need laboratories and buildings in which experiments can be carried on that our universities are demanding plenty of room. You cannot have those things, at least you can't have them where you can get at them without room. We can see this tendency to spread out even in the great universities that happen to be in cities. They are all trying to get out to the borders. Johns Hopkins is moving out to the suburbs of Baltimore. Yale, I think, has just put some of its most important recent buildings at a distance from the old university, and you have done exactly the same thing. You have got out to a place where you have a lot of room. I congratulate you and I congratulate the distinguished gentleman under whose guidance that result was attained, that you have succeeded in getting a place like that, where you can spread yourselves a little, where the self-consciousness of the university can have a chance to develop.

I was talking with a young man whom I know very well, a recent graduate of this institution, who knows Princeton too. He told me that the life here in the university on the Heights was very much the same sort of life as that we have, and I felt that I could in that way have a sympathy with you and with your life that it would be difficult for me to have in other cases. I wish to congratulate you upon having that opportunity to have this country life.

Mr. Chancellor, I wish to convey to you from the Faculty of Princeton University, from the Trustees and from all of us, our most hearty congratulations on your selection to this high office, and our sincere hope and expectation that your administration will be crowned with the most abundant success."

THE TOASTMASTER: "In his inaugural address this morning, Chancellor Brown expressed the hope that the universities and colleges in this city might confer for the advancement of education within its bounds. That conference is about to begin. The time has passed for competition between the universities and colleges of the City of New York, when their halls are crowded beyond the possibility of properly caring for the students who are flocking to their doors and are going to flock to their doors in ever-increasing numbers. I propose the health of Columbia. May her

shadow never be less, and I present to you as her representative, the Educator, Publicist, Diplomat, Messenger of Peace, President Butler."

NICHOLAS MURRAY BUTLER, PH.D., LL.D., LITT.D., PRESIDENT
OF COLUMBIA UNIVERSITY

"Mr. Chairman—I direct your attention to the subtle skill with which my old friend Magie, having first distracted your attention by an anecdote relating to the substitution of silence for oratory, proceeded to leave me but one hour and twenty minutes before midnight!

I became very much alarmed at one time this afternoon at the solemnity of the functions on the Heights. The very earnest exhortations and orations began to make me think that instead of having come to a baptism, I had arrived at a funeral; but those fears have been removed by the cheers and the songs and the very appropriate note of levity which has now been introduced into this occasion. Because, Mr. Chancellor, I want to tell you that being a college president is great fun. You must not believe all these serious things they have been telling you. There is really nothing like it.

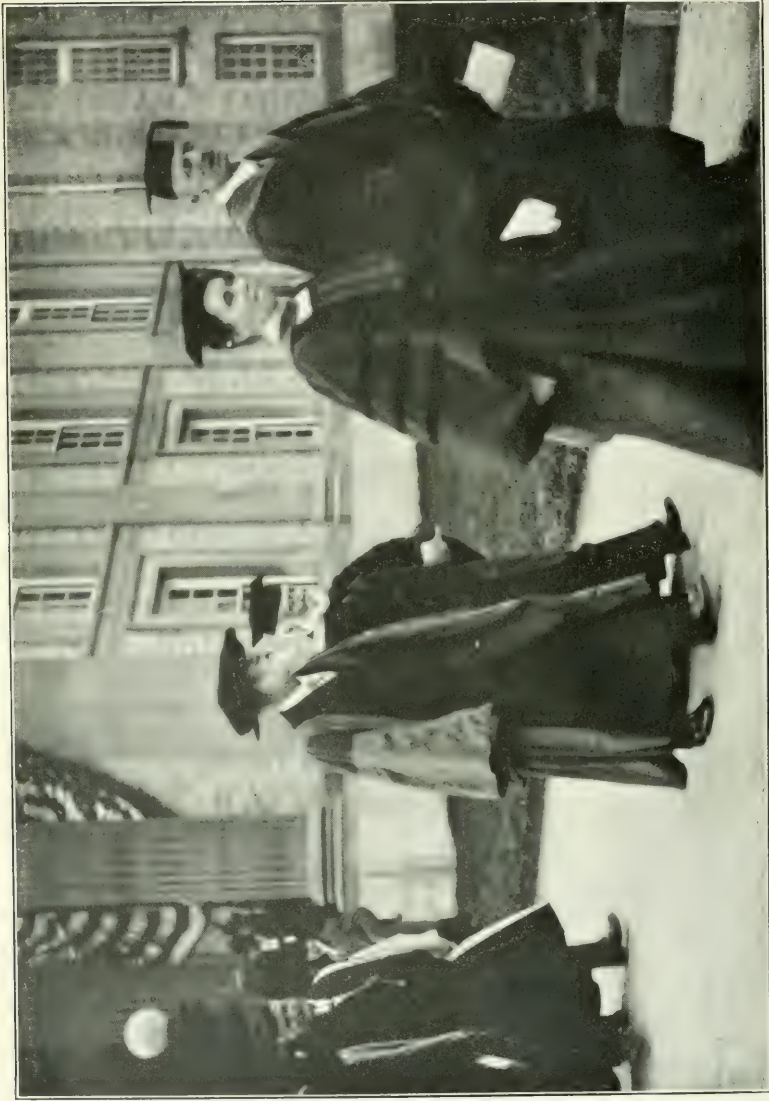
In the first place, a college president lives on a diet of professors. He eats a professor of sociology for breakfast preferably, and if your wife is discreet, you have a man in literature for dinner. It is a really admirable and nutritious diet. In the second place, I assure you that in the course of a year you will meet or hear from one-half of the wise men and all of the lunatics in the community.

Then, in the next place, you will, if you are as well equipped for the post as I believe you to be, speedily become a liar. All college presidents are liars *ex officio*. I remember some years ago that when my dear friend, Dr. Canfield, became Chancellor of the University of Nebraska, he was called a liar by a local newspaper or by some contentious person within thirty days. He was walking with President Eliot of Harvard one Sunday afternoon, while we were all together attending an educational meeting, and Mr. Eliot said to Dr. Canfield, 'Well, Canfield, I see that you are a liar?' 'Yes,' said Canfield, 'I am,' and added, 'I suppose, Mr. Eliot, they have often called you a liar?' 'Oh!' said Mr. Eliot, 'worse than that; they have proved it.'

A little while afterward I told that story to the late Senator Hanna of Ohio. I wanted to indicate to him that



LORD RECTOR ANDREW CARNEGIE AND AMBASSADOR BRYCE; DEAN STODDARD



CHANCELLOR KIRKLAND, PRESIDENT WOOLLEY, DR. CARNEGIE AND AMBASSADOR BRYCE

politicians had no monopoly of this one of the fine arts. 'Oh,' he said, 'let me tell you a story that will illustrate just how that reputation of being a liar arises.' He said that when he went down to Washington with Major McKinley after his election to the Presidency, he met a friend of theirs from a small town in Ohio, who came up to him and said, 'Why, Mr. Hanna, congratulate me.' Mr. Hanna replied, 'On what?' 'Why,' answered the man, 'I am going to be Ambassador to Italy.' 'Ambassador to Italy, you!' 'Why, certainly,' he said, 'certainly.' 'Why,' asked Senator Hanna, 'what makes you think so?' 'Well,' was the reply, 'Major McKinley promised it.' 'Oh, I know,' said Mr. Hanna, 'but what did he *say*?' 'Why, we were talking about it, and he just promised it.' 'I know,' insisted Mr. Hanna again, 'but you can recollect the conversation; what did he *say*?' 'Why,' I said, 'Major, I have been a friend of yours, and I have supported you always, and I thought I would like to ask you if perhaps I could have an appointment?' 'Why, certainly,' said the Major, 'I think so; what would you like?' 'Well,' I said, 'I have been looking through the red book, and I sort of picked out the Ambassador to Italy; and then—then he promised it to me.' 'I know,' said Mr. Hanna, 'but what did he *say*, when he promised it to you?' 'Why,' he said, 'John, what an idea!' Forever after that man believed Major McKinley was a liar, for the ambassadorship never came his way.

You may have observed, you have not had time to read the newspapers to-day, that the gentlemen who collect the ashes and the garbage in this town have gone on a strike, because they do not want to work at night. I say to you now that you need not try that. The rules of our union are a minimum sixteen-hour day, and the only poet who ever understood what we have to do was Rudyard Kipling. He did not write it about college presidents, but that was, I think, merely a slip of the pen. You remember he wrote about a certain type of human being in whom he was interested, and said:

'His work begins at God-knows when; his work is never through.

He doesn't belong to the regular line, and he isn't one of the crew. . . .

You can leave him at night on a bald man's head to paddle his own canoe;

He is a sort of a blooming cosmopolouse, soldier and sailor, too.'

And you will find, my dear Chancellor, that Mr. Kipling hit it about right. You will be surprised at the questions you will be asked, and that you will answer; because omniscience is necessary, absolutely necessary, in the office of college president. If you flinch in the face of a question you are gone. You must know all about it—at least till you can get away.

Of course, there are persons who have quite a different idea of this office, but they are always persons of one of two kinds: either those who have held the office and do not hold it any more, or those who have wanted to hold it and have not held it. Both kinds have an angle of vision that interferes a little with looking the facts in the face. The real fact of the matter is that to be a college president is the greatest fun in the world. You associate with the best human beings that there are. You see them at their best. You try to do things that every intelligent man and woman in the universe believes are worth doing, and everybody who has got a soul or a brain bigger than the head of a pin wants to help you.

Despite the seductive picture of a golf course, which Magie drew just now—because you *can* get to a golf course from here—I am glad you have come to town. I have not so much opinion of these country places where they do not have pavements and water supply and various other things. I have a weakness for comfort.

Let me tell you a little about this town. It is a very queer place. Everybody in New York and outside of it abuses it, but they all like it pretty well. There is a sort of feeling that in order to prove that you are a loyal New Yorker or loyal American, you must say something disagreeable about New York. For instance, some disagreeable man says that the subway is noisy, that the elevated roads darken the streets, and that the streets themselves are torn up. Just look for yourself and see. Those statements are without any basis, in fact. Of course, they have to lay a pipe, I suppose, now and then, even in a city; but as a general rule, I mean, you will find here all the attractions and comforts of a simple Christian home.

Then, you will find people to talk to. I predict that you will make three hundred speeches in the next twelve months, and that after declining seven invitations out of eight. You will find companionship and society of all sorts and kinds; and after you have been enjoying it a little while, if you are turning through the pages of your Longfellow,

you will come some day upon this, and you will do what I did—you will cut it out and paste it on a cardboard and put it on your desk, because it is splendid and it is true. Longfellow wrote these words: 'Where shall the scholar live, in solitude or in society? In the green fields, where he can hear the heart of nature beat, or in the dark gray city, where he can feel and hear the throbbing heart of man? I make answer for him, and I say, in the dark gray city.'

I am glad, my friend, that your lot is going to be cast in this city. Do not be worried about its extent, about the complexity of its population, about the excellence of its government, about any of the problems that are connected with it, for they are the temptation, the inducement, and the incentive, to doing things that are really worth while. There never was, there never has been in modern times such a theater, such a platform for educational activity and influence, as is afforded by this great metropolitan community at the beginning of the twentieth century. Pouring in through these gates come the great populations of Europe, settling here to learn our institutions, to become part and parcel of our body politic, to catch the spirit of our civilization and our laws, and to help those who came first to work out the great problem of democracy at the gates of the continent. Where can you work with a longer lever than here? Where can you help raise a heavier weight, and from what fulcrum can you exert a mightier force? I say to you, my friend, friend of many years, there is no room in American education for institutional competition. There cannot be, there dare not be; for with every institution in this land bound together as a unit, we would yet be feeble before the task that nature and human nature have set us. It is madness to suppose that every man, every force, every element of progress and uplift is not needed. We need it all, and by working together in close sympathy, with complete understanding, before our generation closes we can make this New York what it ought to be—not merely one of the world's great centers of population; not merely one of the world's great centers of commerce and trade and industry and finance and accumulated wealth; but one of the world's great beacon lights, where the things of the human spirit, the things that find expression in words, in deeds, in the achievements of art, and letters and science, in human institutions, are held up as the goal, not only for our dear America, but for all the world. God bless you, as you put your hand to your share in that stupendous task."

THE TOASTMASTER: "I invoke your sympathy with President John H. Finley in the fresh bereavement which deprives us of his presence here to-night, and leaves him fatherless. In silence may we drink to the health of President Finley and the College of the City of New York."

[Toast to President Finley and the College of the City of New York.]

THE TOASTMASTER: "One of the youngest of our universities, whose phenomenal growth has almost overshadowed the State of New York, is Cornell University. I propose a health to Cornell and to her President, Doctor Schurman."

JACOB GOULD SCHURMAN, A.M., SC.D., LL.D., PRESIDENT OF
CORNELL UNIVERSITY

"I desire, Mr. Chancellor, to present to you not only my own personal greetings, cordial as they are, and naturally as they grow out of our acquaintance and friendship, but also the greetings and good wishes of Cornell University, and the assurance of our desire to co-operate with you, and with our sister institutions in the State and out of it, for advancing the great work to which we are all dedicated.

In spite of the levity in which my friend Butler has indulged in his admirable speech, your office is a pretty difficult one. I believe Mr. Roosevelt said that the presidency was a bully place to preach from. Well, the presidency of a college or university offers, as Brother Butler has said, innumerable opportunities for speeches. But there is a lot of hard work in it, and there are difficulties inherent in the situation of American universities, difficulties peculiar to this country. I think the presidency of an American university is, with the exception of one or two public positions, the hardest office in the United States. And it is the hardest because the president has to deal with so many different problems and get on with so many different sets of men. The American university is composed of heterogeneous elements, bound together no doubt for a common purpose and engaged in a common work, but heterogeneous they remain. The members of the institution look at things necessarily from different and often opposing points of view. The point of view of a member of the board of trustees, Mr. Chairman, as you perhaps know, is very different and often radically opposed to the view of a professor. In nine cases out of ten the professor is right and the trustee is wrong:

but the trustee holds the whip hand, because he controls the finances, and the president has got to get on reasonably well with both the trustees and the professors. The professors look at everything as they should from the point of view of the ideal,—of scholarship, science, and culture. The board of trustees often look at everything from the point of view of dollars and cents, and many of them think no more of decapitating a professor than of dismissing a cash-boy. Yet, no university in this or any other country can be conducted on the principles for which such trustees would stand. Then the president has to deal with the alumni and the students, again different groups with different points of view. Here to-night are college and university professors and presidents galore. Haven't we all had experience of the fact that when some great and important change is made in the curriculum, many old students and alumni see in the beneficent change a sign of deterioration and decay? 'Things are not what they used to be when I was a student at the university!' Or, again, look at the matter from the point of view of the students. A court in taking evidence puts on the witness stand, not the offenders themselves, but others, and asks them questions. That violates the student's sense of propriety. It is dishonorable for him to tell anything about his fellow students. You may ask him about himself, but not about others. This is an example of the peculiar code of honor by which our students are guided. Well, the university president has also to get on reasonably well with these other two groups—with students and alumni—who constitute a university, else his tenure of office is likely to be brief.

That reminds me to say something of the tenure of office. It is astonishing how rapidly changes occur in the presidencies of American colleges and universities. I wonder if any of you ever looked the matter up. I did recently because I am completing my twentieth year as president. I have seen changes in the presidencies of Harvard, Yale, Princeton, Pennsylvania, Johns Hopkins, Chicago, Brown, Wesleyan, and all the colleges and universities of New England but two. There is not to-day a president in a college or university to which young men repair in the State of New York who held office when I was appointed, nearly twenty years ago. In the middle west and far west we have state institutions, nearly four dozen of them. Not a single state university has to-day the same president as it had when I was elected to the presidency of Cornell. In

the World's Almanac of that time, there were nearly five hundred institutions called colleges and universities. Some four hundred and sixty or seventy have changed presidents in the interval. I begin, Mr. Chancellor, to be retrospective. I shake hands with you, venerable sir (nodding to Henry Bond Elliot), while I congratulate you on the admirable and eloquent speech with which you represented the alumni this morning.

I believe our Bibles tell us that when the sons of God presented themselves, Satan came also. I understand that modern commentators declare that Satan wasn't an evil spirit, but the sifting agency of Providence. We presidents of colleges and universities are in constant contact with that disposition of Providence, and the changes brought about by it are exceedingly numerous. But don't for a moment infer, Mr. Chancellor, because I present these facts, for facts they are, that I don't agree with my friend Butler, that the office is a good one to hold. You will have a man's work to do, two men's work indeed, most of the time. So that the first qualification to-day for a university presidency is good health. And the second, since you are always exposed to criticism, or likely to be, is a tough skin. But there is much work to do, and it is enjoyable work, and it is the best work there is in the world. That is the thing about it that dignifies and exalts the office. We are engaged in a work which everybody recognizes, as, if not the most important work in the world, at any rate second only to that of moral and religious reform. And we have got the public, I believe, more enthusiastically and confidently behind us to-day than any other calling. And we are doing a most important work. And it is a great thing for any university president to be privileged to feel himself a leader in that work, to be the first servant of the university, to represent the scholars and the scientists, who in very truth constitute the university, to be chief adviser, not the only adviser, still less the dictator, but to be the chief adviser in connection with the great work to which the University is dedicated. This, Mr. Chancellor, is the sort of work to which we bid you welcome and in which we wish you God-speed."



THE INAUGURAL DINNER—GRAND BALL ROOM, HOTEL ASTOR



THE FIRST SIX CHANCELLORS OF THE UNIVERSITY

LIST OF DELEGATES

FROM INSTITUTIONS IN FOREIGN COUNTRIES

UNIVERSITY OF OXFORD—1

RT. HON. JAMES BRYCE, O.M., D.C.L., LL.D., D.Litt.,
British Ambassador; Honorary Fellow of Trinity
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THE PHARMACŒPEIA OF THE BOTANICAL PHYSICIAN
EIGHTY YEARS AGO. By The Hon. WILLIAM RENWICK
RIDDELL, B.Sc., etc.

(Read 13th November 1913.)

In early times in Upper Canada there was a dearth of regularly educated physicians. It was not easy for a professional man to make a living by his practice: except in the towns, patients were few and generally poor. But there was no scarcity of those who undertook to cure the sick. The place of the regular physician was not infrequently filled by the Herb Doctor, the "Yarb Doctor," as he generally called himself. Most of these came from

the United States, few remained long in the same place, and they were generally ignorant quacks - although occasionally a man of real genius in the treatment of disease was to be found amongst them. Not a few were of the Thomsonian School, of which the founder was Samuel Thomson, born before the American Revolution in what is now New Hampshire (*n.* 1769, *ob.* 1843). He patented some of his medicines, which are not yet completely forgotten, and which seem to have met with a ready sale.

In 1832, at Hamilton in Upper Canada, was published a small volume of 120 small octavo pages which purports to contain his practice of medicine, except what he reserved to be taught orally to those who bought the right to use his system. His theory was that "medicines suited to every disease grow spontaneously on our native soil," and that these "are better suited to our constitution."

In this book he names the plants he employs, and gives their qualities and the method of applying them.

I propose in this paper to give an account of the pharmacopœia. I italicise the names Thomson uses, and in giving the botanical equivalents I shall use the names given by Gray in his "Field, Forest, and Garden Botany."

RANUNCULACEAE.—The only member of this family is the *Golden Seal* or *Ohio Kercuma*, *Hydrastis Canadensis*, recommended as a very pleasant bitter and an excellent corrector of the bile.

NYMPHAEACEAE.—This is represented by the *White Pond Lily*, *Nymphaea odorata* or *N. tuberosa*: its roots are to be dug up in the fall, washed clean, cut into strips and dried. Being then powdered, it is used as a tea for bowel complaints.

CRUCIFERAE.—The Crucifers appear only in *Mustard*, *Brassica nigra*, "to create an appetite and assist the digesture," and internally for rheumatism, and *Horse-radish*, *Nasturtium Armoracia*, for the same purposes—but this is apt to raise a blister.

RUTACEAE. This family furnishes *Prickly Ash*, *Zanthoxylum Americanum*, whose bark or berries in wine or spirit make a very good hot bitter: "good for fever and ague, for sleepiness and lethargy, cold hands and feet, and other complaints caused by cold."

ANACARDIACEAE. — The *Sumach*, *Rhus typhina* or *R. aromatica*, claimed by Thomson to be a new article in medicine. A tea made of bark or leaves or berries will "scour the stomach and bowels and is good for stranguary."

LEGUMINOSAE. — *Red Clover*, *Trifolium pratense*. The heads are boiled for an hour, strained, and pressed to get out all the juice, "then simmer over a slow fire till it is about the consistency of tar, when it is fit to use. Be careful not to let it burn . . . spread on a piece of bladder split and made soft. It is good to cure cancers, sore lips, and all old sores."

ROSACEAE. — This family has several representatives. In the Rose family proper we find the *Evan Root* or *Chocolate Root*, *Geum rivale*, used also to "scour out the stomach and bowels," but some use it as a drink instead of tea or coffee.

In the Rose family proper is also found *Red Raspberry*, *Rubus triflorus* or *R. strigosus*. The leaves only are used: a tea made of them is good for children with the summer complaint and for women in labour, as well as for the new-born child.

The Pear subdivision also supplies members: *Peach*, *Prunus* (*Amygdalus*) *Persica*. Only the meat of the peach stones is used: made into a cordial it will "recover the natural tone of the stomach after long sickness" and "restore the digesture," while used as a tea it is invaluable for "young children with the cholic."

Wild Cherry Stones (*Prunus Pennsylvanica* or *P. pumila* probably is meant) may be used in the same way as peach stones. The cherries themselves, steeped in hot water, after being pounded up with the stones, make a good tea: sweetened with loaf sugar with a little brandy added they create an appetite and restore the digestive organs. (*Bitter Almonds* may be used when Peach or Cherry stones cannot be procured, but that tree is not native.)

HAMAMELACEAE. — This family gives only *Witch hazel*, *Hamamelis Virginica*. The leaves made into a tea is the best thing for bleeding at the stomach the writer has ever found, and he used it also for injections in "complaints of the bowels."

UMBELLIFERAE.—But one representative of the Parsley family appears, *Archangel*, *Archangelica atropurpurea*, a good corrector of the bile.

ARALIACEAE.—The celebrated ginseng, called by Thomson *Genseng*, belongs to this family: *Aralia quinquefolia*, a nervine: the root should be dug up in the fall, dried, and reduced to a fine powder: a dose—a half to a teaspoonful.

RUBIACEAE.—*Clevers*, better known as cleavers or goose-grass, *Galium Aparine*, a diuretic.

VALERIANACEAE.—*American Valerian*, *Valeriana sylvatica*, “the best nervine known . . . in all cases of nervous affection and in hysterical symptoms.” The roots are to be dug up, washed clean, carefully dried and reduced to a fine powder, administered half a teaspoonful at a time, repeated if necessary.

COMPOSITAE.—As was to be expected, the Composite family is largely drawn upon.

Squaw-weed, *Senecio aureus*. The green roots and leaves are bruised, hot water poured on them: give this as a tea, and it is effective for “canker rash,” rheumatism, and nervous afflictions. Thomson calls this plant also *Frost-weed*, but in Ontario the *Helianthemum Canadense* goes by that name.

Elecampane, *Inula Helenium*. The root, made into a syrup, is good for a cough. In my youth this was supposed to be a good “horse-medicine.”

Maryweed, *Maruta Cotula*. “A tea made of this herb, to be drank hot when going to bed, is very good for a cold.”

Wormwood, *Artemisia Absinthium*, makes a very wholesome bitter. A tea or the green herb tinctured in spirit “is good to apply to a bruize or a sprain.”

Tansy, *Tanacetum vulgare*, made into a tea, is good for hysterics and other female complaints, also for a “stranguary”; the green leaves powdered are good for “bruizes and sprains.” Apparently its alleged virtues as an abortifacient and eebolic had not then been discovered.

Chamomile, *Anthemis nobilis* (and perhaps *A. arvensis*), made into a tea, is good for bowel complaints: used externally, it will relieve “sprains, bruises and swellings, and remove callouses, corns, etc., and restore shrunk sinews.”

Burdock, *Lappa officinalis*. The leaves wilted by the fire

will allay inflammation: they are good pounded and applied to a bruise or a sprain and make excellent strengthening plasters.

Thoroughwort, *Eupatorium perfoliatum*, made into a tea, is good for a cough and complaints of the lungs.

Featherfew, *Chrysanthemum* (*Leucanthemum*) *Parthenium* or *Pyrethrum Parthenium*, is "good for histeric complaints," and is diuretic.

Golden Rod, *Solidago nemoralis* and *S. rigida*. The oil made into an essence is good for pain in the head.

Wild Lettuce, *Lactuca Canadensis*. The roots, powdered, are good to restore weak nerves.

Bitter Thistle, *Silybum Marianum*, made into a tea, is a good corrector of the bile, and so is *Cardis benedictus* or *beloved thistle*. This is as near as the author could get to *Cardus benedictus*, the *Unicus benedictus*, or blessed thistle.

LOBELIACEAE. This family supplies the crowning glory of Thomson's system, *Lobelia* or *emetic herb*, *Lobelia inflata*, whose virtues are claimed as his original discovery, and which was No. 1 in his system of medicine. All parts were used, powdered leaves and pods, the green herb in tincture, and the seeds powdered. It was employed in every disease, either as an emetic or in the form of a clyster.

ERICACEAE.—*Pipsisway* or *Rheumatic Weed*, *Chimaphila umbellata*. Roots and tops made into a strong tea are "good for cancers and all scrofulous humours by drinking the tea and bathing with it the parts affected."

SCROPHULARIACEAE. *Bitter-herb* or *Balmomy*, *Chelone glabra*. Used as a tea, "this herb is very good to correct the bile and create an appetite."

PLUMBAGINACEAE.—*Marsh Rosemary*, *Statice Limonium*. The root is good for canker and sore mouth.

Mullen, *Verbascum Thapsus*. The leaves pounded and applied warm are "very good to bring down swelling and to restore contracted sinews."

VERBENACEAE.—Both *Blue Vervine*, *Verbena hastata*, and *White Vervine*, *V. urticifolia*, are highly thought of, ranking next to lobelia itself "for a puke," and also being good to prevent a fever in its first stages. The herb has

also cured several cases of consumption "where the doctors had given them over."

LABIATAE.—*Spearmint*, *Mentha viridis*, given as a tea, stops vomiting.

Peppermint, *Mentha piperita*, promotes perspiration and relieves pain in the stomach and bowels.

Peneroyal, *Hedeoma pulegioides*, "may be freely used in all cases of sickness: it is good for the stomach . . . it will produce perspiration and remove obstructions."

Summer Savory, *Satureia hortensis*, is good for colds; and the oil will cure toothache.

Hoarhound, *Marrubium vulgare*, is good for a cough. "An infusion made of the leaves, sweetened with honey, is good for the asthma and all complaints of the lungs," while "hoarhound candy is very useful . . . for old people and those that are short-winded."

SOLANACEAE.—*Capsicum*, *Capsicum annuum*, ground to a powder, forms No. 2 of the system, and is given to "strengthen the digesture," but externally it is "good to put on old sores."

Bitter-sweet, *Solanum Dulcamara*, Thomson uses only externally, and finds it, made into an ointment, "an excellent thing for a bruise, sprain, callous, swelling or for corns."

ASCLEPIADACEAE.—*Bitter-root* or *Wandering Milkweed*, of two kinds, *Asclepias phytolaccoides* on moist ground and *A. verticillata* on dry. The roots only are used, dried and pounded in a mortar: while they are very bitter, they are an excellent medicine to remove costiveness and correct the bile.

ARISTOLOCHIACEAE.—*Snakeroot*, *Asarum Canadense*. To be made use of "in tea for measles and other eruptions to keep the disorder out," also "for all nervous complaints." That *Asarum* is the "snakeroot" meant, and not *Eupatorium ageratoïdes*, which is also popularly called snakeroot, is clear from Thomson's description of it as of a hot nature, thus identifying it with Canada Wild Ginger, or *Asarum*.

POLYGONACEAE.—*Yellow Dock*, *Rumex Crispus*. The root made into an ointment with cream, rubbed in at bedtime, will cure the itch.

URTICACEAE.—*Slippery Elm*, *Ulmus fulva*. The inner bark is dried and ground, a teaspoonful of the powder is

put into a teacup, a little cold water added, stirred until perfectly mixed, then hot water added and stirred till a jelly is formed. The jelly is an excellent medicine for sore throat; the bark also is used for poultices, for burns, scalds, old sores, etc. Half a century ago I have seen the inner bark fresh from the tree boiled into a jelly and the jelly given for colds and sore throat.

JUGLANDACEAE.—*Butternut*, *Juglans cinerea*. The bark boiled down thick makes good pills for emetic and cathartic purposes; or a syrup made by boiling the bark with molasses and a little spirit may be given to children for worm complaints. "The bark of the butternut is the principal ingredient in Dr. Hawkes' rheumatic and cancer pills, and also of Chamberlain's bilious cordial, which have been so celebrated for many complaints."

MYRICACEAE.—*Bayberry* or *Candleberry*, *Myrica cerifera*. The bark of the root dried and powdered is "highly stimulating and very pungent, pricking the glands and causing the saliva and other juices to flow." It is the chief source of Thomson's No. 3.

Meadow Fern, *Comptonia asplenifolia*. The "burr pounded fine and simmered in cream, hog's lard, or fresh butter, is almost a sovereign remedy for the itch or external poison and all bad humour sores," also "for salt rheum or canker sores."

BETULACEAE.—*Black Birch*, *Betula lenta*. The bark, used as a tea, is used for dysentery and all complaints of the bowels.

SALICACEAE.—The *White Poplar*, *Populus alba*, and the *Stinking Poplar*, *P. balsamifera*, belong to this family. The inner bark is taken off trunk, limbs, or root, dried, and used as a tea for "headache, faintness at the stomach . . . and those of a consumptive habit will find great relief in using this tea freely." It is also a valuable diuretic.

Balm of Gilead, *P. balsamifera* (var. *Canadensis*), may be used in the same way, but "it is more harsh than the other kinds of poplar." It is good taken inwardly, as a restorative, is a good corrector of the bile, and will operate both as an emetic and cathartic, while externally it is used for bathing sores.

CONIFERAE.—*Balsam Fir*, *Abies balsamea*, produces the

Canada balsam from small blisters in the bark. This is good to remove internal soreness, and forms an important article in Thomson's healing salve.

Hemlock, *Abies Canadensis*. The inner bark is dried and powdered, made into a tea, and administered for "canker and other complaints of the bowels and stomach." The boughs, made into a tea, are very good for gravel and for rheumatism.

ARACEAE.—*Skunk Cabbage*, *Symplocarpus foetidus*. The root dried and powdered, made into a tea, is good "for asthma, cough, difficulty of breathing, and all disorders of the lungs."

LILIACEAE.—*Wake Robin*, *Trillium erythrocarpum*. The root, dried and reduced to powder, is given with honey or in a syrup; it "is extremely pungent and stimulating and is given for cholic and pain in the bowels and to expel wind . . . for coughs and disorders of the lungs."

The empiric is not quite true to his principles, for he uses a few exotic plants: bitter almonds, ginger, black pepper, cloves, and myrrh. Myrrh, indeed, is the main ingredient in his celebrated medicine, which he calls No. 6.

He is not wholly averse from chemical preparations: sal ammoniac, lime, spirits of turpentine, all appear as remedies.

Products of the animal kingdom he does not discard, butter, honey, beeswax, milk, etc.

Vegetable products are frequently met with—turpentine, rosin, pearlash, etc.; but these may fairly be included in his theoretical category.

The school founded by Thomson¹ afterwards merged in the Eclectic School, and at length has practically disappeared. Many of the Thomsonian remedies are, however, in common use in the farming community to this day.

¹ It must not be thought that all botanical physicians were followers of Thomson; quite the reverse is the fact. Many practised by the light of nature, some relied upon their own experience, while some few had a real medical education.

I have before me a duodecimo volume printed at New York in 1829, "The Improved System of Botanical Medical Practice . . . by William Barber." Barber practised in Vermont and other New England States, then came to Auburn, New York, and finally to New York City. He wholly repudiated Thomson's system. He says: "My preparations are of my own discovery." He pestered the New York Legislature year after year for a license to practise. He was a quack and pretender of the rankest kind.

The Experiences of an American Soldier in the War of 1812-14

By
The Honourable William Renwick Riddell

An Address before the Empire Club
of Canada, Toronto

THE EXPERIENCES OF AN AMERICAN SOLDIER IN THE WAR OF 1812-14.

An Address delivered by the HONOURABLE WILLIAM RENWICK RIDDELL, LL.D., etc., Justice of the Supreme Court of Ontario, before the Empire Club of Canada, Toronto, November 6th, 1913.

We Canadians are by no means unduly modest in the estimate we place upon ourselves or our country—and we do not forget to glory in our past.

The Scottish Bard has it:—

“O wad some Power the giftie gie us
To see oursels as ithers see us!
It wad frae mony a blunder free us
An’ foolish notion.”

I doubt that it would have much effect—man is a stubborn creature: but it might have some little chastening influence. And perhaps the knowledge of how another looked upon our land and some of its inhabitants a hundred years ago may be for our good.

Samuel White, of Adams County, Pennsylvania, published at Baltimore, in 1830, a little 12 mo. with the title:—

“HISTORY
OF THE
AMERICAN TROOPS
DURING
THE LATE WAR
UNDER THE COMMAND OF
COLONELS FENTON AND CAMPBELL

Giving an account of the crossing of the Lake from Erie to Long Point: also the crossing of Niagara by the troops under Gen’ls. Gaines, Brown, Scott and Porter. The taking of Fort Erie, the battle of Chippewa, the imprisonment of Col. Bull, Major Galloway, and the

author (then a captain) and their treatment: together with an historical account of the Canadas:

BY SAMUEL WHITE
OF ADAMS COUNTY, PENN.
BALTIMORE
PUBLISHED BY THE AUTHOR
B. EDES, PRINTER
1830"

Claiming to be "a plain man himself" he did not attempt "to embellish his narrative with high-flown language, nor to impose upon the credulous a string of fictitious adventures," but offered "a plain statement of facts" only. He warns his readers, too, that although he has been forced to speak of Englishmen very harshly in many instances, all of that nation are not such as he has described, "he has had the pleasure of knowing many, who were an honour to their country." So fortified, we approach Capt. White's story.

The Governor of Pennsylvania in 1814 called out the militia of that state to the number of 1,000 to repel the inroads of the British on the northern frontier. The Pennsylvanians do not seem to have been any more eager to fight than they had been fifty years before when Amherst found it impossible to get any troops from that province to fight the common enemy, the Indian, "which," says Amherst, "places them in the most despicable light imaginable." However it may have been in 1763, in 1814 Major Galloway and Captain White held a court martial for the trial of delinquents, "and after several days of arduous exertion, completed our business by the assessment of fines to the amount of over forty thousand dollars." That looks like a fairly large sum to make out of delinquents in a call of one thousand militia.

(In an American book by M. Carey, "The Olive Branch," of which the first edition appeared at Philadelphia in 1814, and others including the sixth, in 1815, it is stated (at p. 381 of the sixth edition) that the fine in Pennsylvania upon a militia man for desertion was

\$32 for a private and \$36 for a non-commissioned officer.)

The force camped near Erie—an expedition was intended against Long Point on the other side of Lake Erie under the command of Col. Campbell of the 11th United States Infantry. The invading force composed of four hundred regulars and five hundred volunteers, crossed over, May 15th and 16th. A company of dragoons fired upon the boats from the Canadian shore; but before the actual landing, they retreated—no doubt to join the remainder of the troop, which as we know from other sources, were with a small party of Canadian militia, holding Fort Dover.

All the night of the 16th and all day of the 17th, the Americans remained "in a piece of woods near the lake exposed to the rain which poured upon us * * having no shelter except the boughs of the trees under which we rested." Next morning they crossed "Buffaloe Creek" and marched for Port Dover, having adopted what Capt. White thinks "a very politic and ingenious mode of forming," that is, "in single file, showing our whole force in front." Passing over the question whether that formation is what a military man would call "single file," we follow the troops. The British troops retreated as the invaders entered the village, and "when we reached Dover we found it deserted by all but a few women, who had white clothes hanging upon broomsticks suing for peace." So far our author agrees with reports from Canadian sources: but here begins a marked difference in the story. White says that the only hostile demonstration on their part was the destruction of some mills which were employed making flour for the army, and some houses occupied as stores—but he admits that they did burn some houses belonging to officers who had been engaged in the expedition against "Buffaloe" and Black Rock the year before. He says that "strange as it may appear, it is not the less true, that on the very day after the British came to Dover, they burnt all the houses we had left standing." One must agree that it does appear very strange indeed—especially when the Canadians say that

the Americans burned the whole place to the ground, mills, distilleries and private houses; and add "a more wanton and barbarous wrong cannot be conceived."

A still stranger thing than the British burning their own houses is the weird fact that the one man who had been taken prisoner by the Americans but set free on their retreat, was, says White, promptly hanged by his people when they returned to Dover.

The invading force were some three days on the lake on their return voyage; and the whole expedition lasted some five days.

Col. Campbell being brought to book sent an impudent letter to the British General: he was afterwards court-martialed for his scandalous conduct, but escaped with a rebuke—the court declaring that the burning of the mills and distilleries was according to the rules of war, but the burning of the private houses was an error in judgment. It is in reference to this exploit that the Rev'd. John Strachan in his trenchant and unanswerable letter to ex-President Jefferson, January 30th, 1815, writes as follows:—

"On the 15th of May a detachment of the American army under Colonel Campbell, landed at Long Point, district of London, Upper Canada, and on that and the following day, pillaged and laid waste as much of the adjacent country as they could reach. They burnt the village of Dover, with the mills, and all the mills, stores, distillery and dwelling houses in the vicinity, carrying away such property as was portable, and killing the cattle. The property taken and destroyed on this occasion was estimated at fifty thousand dollars."

This is how Kingsford puts it:—

"Colonel Campbell's feat, with 500 regular troops, was to lay waste the surrounding district to the greatest extent he was able, he and his men robbing the inhabitants of their private property. He destroyed a saw-mill and tannery, 5 distilleries, 6 stores, 13 barns, 3 grist-mills, 19 dwelling houses; turning out from sheer malignity, amid the burning embers, 25 ruined families to shift in the future as they best could. Such was the

conduct characterized by Colonel Winfield Scott as an 'error of judgment.'"

The following is from a report by Major-General Riall to Sir Gordon Drummond, dated Fort George, May 19th, 1814:

"Sir,—I have the honor to transmit to you a report made to me by Colonel Talbot, commanding the militia in the London district, that on the 14th inst., a party of the enemy, consisting of about 1,800 men, had crossed Lake Erie from Presqu' Isle and landed near Dover, which place, together with the mills and stores in its neighbourhood, they destroyed, and after having committed every other excess possible, re-embarked. They showed a disposition to land again at Turkey Point, but were, it is supposed, deterred from doing so by the appearance of a body of militia and a detachment of the 19th Dragoons, whom Colonel Talbot had assembled at that place. When Colonel Talbot had despatched his report the enemy's vessels were at anchor at the extremity of Long Point. Should they again attempt to land I hope they will be received by a detachment of troops and Indians which I ordered from Burlington under the command of Lieut.-Colonel Parry, 103d Regt., upon receiving the first intelligence of their attempt.

Sir Gordon Drummond reports to Sir George Prevost from Kingston, May 27th, 1814.

"Sir,—In my letter which I had the honour to address to Your Excellency on the 21st inst., I stated that a force of the enemy, at that time supposed to be about 300, had landed near Dover on Lake Erie. I have now the honour to transmit a letter from Major-General Riall conveying a report of Colonel Talbot, commanding the militia of the London District, on the subject. Your Excellency will, however, perceive that the force of the enemy has since been computed to consist of about 800 men, whose conduct has been disgraced during their short stay ashore by every act of barbarity and of illiberal and unjustifiable outrage. Not only a large store, fitted as a barrack for the militia, but every private house and other building belonging to the peaceable in-

habitants of the village and neighbourhood of Dover has been reduced to ashes, together with Ryerse's and Finch's mills between that place and Turkey Point. The court house and public buildings at Turkey Point were only saved by the appearance of the militia and a detachment of the 19th Light Dragoons, both of which corps I have very great satisfaction in acquainting Your Excellency, evinced the strongest anxiety to come in contact with the enemy.

I have likewise received from Lieutenant-Colonel Parry of the 103d Regiment, the most satisfactory accounts relative to the conduct of the grenadier company of that corps and the light company of the 89th, placed under his immediate orders. The latter, he says, are wild, but with attention and management perfectly tractable and orderly, and Lieut.-Colonel Parry bestows much commendation on the zeal and alacrity with which the militia assembled, considering the distance from whence they were to be collected. The Lieut.-Colonel from all these circumstances feels convinced that had not the enemy retired to his shipping before his arrival, his little band, increased by a few of the rangers and Kent volunteers as well as some persons and some Wyandot Indians who joined him from Amherstburg, would have made the enemy pay dear for their outrages. He states that but one house, in which a sick woman resided, was left standing between Paterson's Creek and Turkey Point, and the enemy on retiring avowed their intention to destroy Port Talbot in a similar manner. And as their officers appear determined to pursue the same system throughout the whole of the western frontier, I feel convinced that nothing but the most vigorous opposition to such disgraceful proceedings will prevent a recurrence of them."

Capt. White does not seem to think there was anything wrong or irregular in the raid—indeed, he seems rather astonished at the moderation of himself and his comrades. Next day orders came for a march to Buffalo, but this was checked for a time by a mutiny. White arrested the ringleader, and the march proceeded. Entering New York State they noticed a great

scarcity of men in that part of the state, "many I presume had been killed by the enemy" the year before. We must not omit to notice the unholy glee exhibited by the Cataraugus Indians, "and their squaws who appeared very much pleased to see us, more particularly as they understood we were going to fight the British."

The houses along the road were "literally crammed with ladies collected * * to see us as we passed through the country"—and the gallant captain "would strongly recommend all who may be in want of handsome wives to visit the borders of Lake Erie, for I have never seen before or since in any part of the country more beautiful and elegant looking ladies." It seems almost too bad that the captain was already married—but so it was.

Losing a few men by desertion they arrived at Buffalo and found a body of U. S. regulars there with Gen. Brown in command. July 2nd they crossed over the river, and the next day took Fort Erie with its garrison of 137 men "including officers." Then the general ordered a march to meet "the enemy who lay entrenched in his works upon the plains of Chippewa." We know from other sources that this force was under the command of Gen. Riall and Col. Pearson (who had taken part in the Battle of Chrystler's Farm the year before). The British force consisted of about 1,500 regulars, including cavalry, a small number of militia and some 300 Indians. The attacking force was about 5,000 strong, 3,000 being regulars.

Captain White complains of the neglect to supply the invading troops with provisions—when they had travelled eighteen miles without provisions, volunteers were called for to drive off the hostile Indians who were firing on the pickets. With others the captain volunteered and "these were strengthened by several hundred Indians, the whole under the command of General Porter, Col. Bull and Major Galloway." Following the British Indians through the woods, they "came in full contact with the British regular line." The battle was going on in full vigour, and shortly after the

"whole British force fell back and being closely pressed by the American troops, retreated in confusion to their entrenchments about a quarter of a mile distant." This battle is considered by White to have been a brilliant victory for American arms. He says triumphantly, "The conquerors of the veterans of France were, in fact, defeated by a detachment from the American army * * the conduct of these men was heroic in the extreme: wherever they directed their fire or pointed their bayonets the boasted conquerors of the Peninsula fell or fled." How different the language of this early American from the modest self-depreciation we are familiar with in those who have followed him. There can be no doubt that the American troops engaged in this campaign showed much better quality than those who had invaded this region previously, and who had met with disaster at Queenston Heights.

At all events, victory or no victory, there were no British prisoners, and Riall carried off his men and guns, having destroyed his earthwork, while the losses on both sides were about equal. The President of the United States, Mr. James Madison, seems to have thought the invasion at the Niagara Frontier very successful: he says in his message of September 20th, 1814, "Besides the brilliant incidents in the minor operations of the campaign, the splendid victories gained on the Canadian side of the Niagara by the American forces under Major-General Brown, and Brigadiers Scott and Gaines have gained for these heroes and their emulating companions the most unfading laurels: and having triumphantly tested the progressive discipline of the American soldiery, have taught the enemy that the longer he protracts his hostile efforts, the more certain and decisive will be his final discomfiture." Can it be credited that notwithstanding this warning the Canadians and other British refused to lie down and take their licking? Why, they even claimed to have been successful themselves—but what will "monarchists" not do?

White and his friends Col. Bull and Major Galloway were taken prisoner by Indians, and Bull was almost

at once killed by them. The captain was afterwards informed by a "Canadian gentleman * * that the murder was committed in compliance with the order of Gen. Riall"—and he seems to try hard to believe this monstrous charge. (Colonel Campbell was desperately wounded in this campaign—the cap of his knee was carried away by a cannon shot, and he died in extreme agony. Major Richardson charges him with great barbarity toward his prisoners.)

Galloway and White were forced by their savage captors to run till they thought they would drop dead. Finally both were brought before Gen. Riall who asked a number of questions, "the truth of which I was determined he should not know from me"—they were then given in charge to sergeants of the British army who kept them all night behind the breast-works on the bare ground without tent or covering of any kind. It would seem that the soldiers were no better off; and the sergeant who had White in charge lent him an old watch-coat—"he also gave me a dra n from his canteen."

On the third day thereafter, White hoped to escape, as an engagement seemed to be going on; but he was watched too closely. "Major Galloway, two of our volunteers, one Indian, myself and three or four Canadians who were in confinement on suspicion of being friendly to the American cause, were led into the field under a strong guard and halted to await the fate of the day." The British retreated to Lundy's Lane and then to Queenston Heights, where White had a narrow escape, a certain "fellow" charging him with being a deserter from an English regiment, and concluding "d—n you, I will have you hung." This peril passed over; they marched for Fort George and finally sailed for York on a vessel "so crammed with wounded men, that the other prisoners and myself were obliged to remain on deck the whole time of the passage from Fort George to York." On the march from Chippewa to

Fort George, a gentleman named Carr,* "a doctor," had kindly given the prisoner a \$20 bill to divide between himself and his friend in misfortune Major Galloway—and the British officers added another \$5 bill, while a dragoon officer sent them some tea and sugar, and a bottle of rum. White makes it a matter of great complaint that "all the time we drew rations we were never allowed any liquor, and got none except the one bottle thus made a present of," and compares this barbarous treatment with the treatment of prisoners in the American camp, where as "I know to be a fact * * the men belonging to my own company have gone without their liquor that prisoners might be better accommodated." Could self-denial and courtesy reach a higher point? And would the modern American be able to give up his Manhattan or Martini in like case?

At York† the prisoners were marched to a tavern where the landlady sold them two old shirts more than

*This was Dr. Robert Kerr who had been Surgeon to Sir John Johnson's Second Battalion: he settled in Newark (Niagara) and became Surgeon to the Indian Department. He had also a large private practice. In the war of 1812 he took an active part in a surgical way: afterwards he became Judge at the Surrogate Court of Niagara: and a Magistrate for the District. He was fond of sport and nicknamed the "boxing Magistrate." His wife was the daughter of Sir William Johnson and "Molly," sister of Brant; and his son became chief of the Mohawks. He was appointed by the Governor a member of the Medical Board for the examination of those applying for a license to practice—and seems to have been not only a most loyal but also a capable and humane physician and surgeon. Some may be interested to know that he was a Mason of high degree.

Dr. Robert Kerr was a member of the Land Board for the District of Nassau, appointed by Lord Dorchester to act from and after May 1, 1791, and afterwards he was a member of the Land Board for Lincoln County only. He was himself grantee of lots 29, 30 and 31 in the 2nd Concession of "Township No. 7."

His wife, Mrs. Elizabeth Kerr, was a woman of great natural ability, an accomplished lady and an author of no little merit; she wrote several very interesting books on the customs and religion of her mother's people. She and her husband passed most of their lives in Niagara.

†Surveyor-General Ridout, in a letter to his son at Cornwall, dated at York, Sunday, 10th July, 1814, gives a graphic account of the wounded and their arrival at York.

half worn for "the *moderate* price of eight dollars." Perhaps the landlady thought to get even with an American for the sack of York by his countrymen in May of the previous year. We hear much of the wanton destruction of Washington by the British forces, and find their conduct compared to that of the Barbarians of the middle ages—but it was no whit worse than the conduct of the American troops at Toronto and Niagara, of which we hear little, if anything.

Being ordered to Montreal they gave their parole, but "we did not profit much * * * for an hour had scarcely passed after we had signed the parole when we were ordered on board a Durham boat to be sent under guard to Kingston. The British officers on board when night came on went ashore and always took Galloway and myself with them: we lodged in a house convenient to the vessel, the other prisoners were suffered to remain on board under guard."

We know that while there was what was called a road from York to Kingston at that time (it had been built by Danforth, an American, about 1800) it was not too good, and part of the year was almost impassable—and it must occur to anyone that the prisoner was very fortunate in being carried on a Durham boat rather than plowing his way along on foot.

Landing at Ives' Creek, about 18 miles east of York, they put up for the night—White had been very unwell for some days, and there was taken so ill that he could not be moved. He remained in a very bad state for eight or ten days, putting up at Mr. Ives', and was given up by the medical man appointed by the Government to attend him. But his "better fortune brought an old Yankee Doctor, as they called him * * Mr. Ives' family physician, on a visit to the house—having seen me and examined the medicine which was administering to me, he pronounced my case as desperate but

* * expressed an opinion that something might yet be done for me * * *

He changed the treatment and "whether it was owing to this change of practice or that the crisis of the disease had arrived," the prisoner began to get better almost at once. When he was con-

valescings he "had many visitors from several miles distance who always came after dark and returned the same night: they were very anxious to know what was the intention of the United States in sending troops into Canada, and if they had determined on taking it—if such they said was our intention, a powerful party in Canada might be raised to assist in the undertaking * * *. There were an immense number of men at that time disaffected with Government, and had the United States deemed it expedient, or possessed the means of sending a large army into Canada with the avowed purpose of freeing them from British Dominion, numbers would have flocked to our standard, and" adds the sanguine Pennsylvanian, "they might with reason have trembled for their possession."

Notwithstanding the general opinion and little flattering as it is to Canadians of that time, it must be admitted that there was undoubtedly a want of loyalty, or at least a want of willingness to fight the American invader, exhibited by the Canadian settler on more than one occasion, and at more than one place. A contemporary work published in 1813, at Philadelphia, written by one M. Smith, who was an American but who had lived in Upper Canada for some time before the war and had been allowed by the Government to leave the province on the outbreak of the war, a number of statements are made which are corroborated by facts which are well known. The book is called "A Geographical View of the Province of Upper Canada, etc." On page 87 he says, "It was generally thought in Canada if Hull had marched in haste from Sandwich to Fort George, the province would then have been conquered without the loss of a man * * Brock * * ordered some part of the militia from the District of London, about 100 miles from Sandwich, to march there. This many refused to do of their own accord, and others were persuaded so to refuse by a Mr. Culver, a Mr. Beamer, and one more who rode among the people for six days telling them to stand back. Whenever the officer came to warn the inhabitants to meet at such a place to receive arms and orders to march against

Hull, they promised to go; but instead of going they took some provision and went to the woods, and there waited in hopes that Hull would soon accomplish his promise, but, poor things, they were deceived and had to return and obey orders."

After the surrender of Hull "the people of Canada became fearful of disobeying the government; some that fled to the wilderness returned home, and the friends of the United States were discouraged and those of the King encouraged * * *" In the Talbot papers will be found some account of this trouble in the London District.

On p. 93, Smith says that about twelve days after the Battle of Queenston Heights "Col. Graham on Yonge Street, ordered his regiment to meet in order to draft a number to send to Fort George: however, about forty did not appear but went out into Whitechurch township, nearly a wilderness, and there joined about thirty more who had fled from different places. When the regiment met there were present some who had liberty of absence a few days from Fort George; these, with others, volunteered their services to Col. Graham to the number of 160, to go and fetch them in, to which the Colonel agreed but ordered them to take no arms, but when they found they must not take arms they would not go. At the first of December they had increased to about 300, about which time, as I was on my way to Kingston to obtain a passport to leave the province, I saw about 50 of them near Smith's Creek [now Port Hope] in Newcastle District on the main road with fife and drum, beating for volunteers, crying huzza for Madison [the President of the United States]. None of the people in this district bore arms at that time, except twelve at Presquile Harbour. They were universally in favour of the United States, and if ever another army is landed in Canada this would be the best place * * * many of the Canadian militia would desert * * * but * * * an army dare not rebel, not having now any faith in any offers of protection in a rebellion, as they have been deceived." This last refers to the promises made by Hull on the strength of which

several Canadians joined him, only to be left to their fate when Hull surrendered. It was reported that they were hanged; contemporary American reports state that they were shot at Fort George: whatever their fate, it was a deterrent.

About this time a boat load of marauders—though White does not call them that—landed near the creek, robbed the mail and took prisoner a Colonel of Militia and his son, also an officer in the militia—but they soon released them. Canadian history, so far as I know, does not mention this exploit.

It is probable that the story is an emendation of that of a real exploit which has been credited to the notorious "Bill" Johnston, "patriot" according to some, "pirate" according to others. It is said that shortly after burning a schooner lying nearly completed on the stocks at Presqu' Isle, he crossed over the bay and waylaid the mail at a spot about half way between what are now Brighton and Smithfield villages. He with his gang demanded the mail bag from the boy who was carrying it on horseback, and having received it, let the boy and horse go. This version is given in the Ont. Hist. Soc. Papers, vol. 5, p. 70; but Bill Johnston did not make his appearance as a "land pirate" till the troubles of 1837.

The real heroes will appear from the following extract from a report by Sir Gordon Drummond to Sir George Prevost dated at Kingston, July 17th, 1814, which reads in part: "I am concerned to inform Your Excellency that a gunboat and a Durham boat of the enemy landed a strong party at Presqu' Isle (Lake Ontario) in the night of the 1st instant where they burnt the store house of a Mr. Gibson and a small schooner which was building there by him."

The following is from "Boston Yankee" newspaper of July 15th, 1814, as an extract from a letter addressed to a gentleman in New York, and dated Sackett's Harbour, July 6th, 1814: "With pleasure I inform you of a small expedition (fitted out of this place on the 27th ult., and returned this day) of two whale boats carrying 15 men each, who succeeded in burning a bomb vessel of 90 tons, on the stocks ready for launching, to-

gether with a public building containing naval stores, at a place called Presq' Isle, directly opposite Oswego on the Canada shore."

Major Rogers‡ came along and said "he would not trust me, and that as soon as my health was sufficiently established * * he would have me carried into the country so as to be at a distance from the lake." And so it was—but in ten or twelve days the prisoner was put on board a boat in charge of Lieut. Norris, of the Canadian militia, to be taken to Kingston. "Rogers was

* * a militia officer, a devoted Monarchist, and in consequence of his zeal was then, though stationed at home, under full pay from his government, being kept there to have an eye to the inhabitants and prevent them from making their escape to the United States. In many places along Lake Ontario the inhabitants had deserted their homes and farms and made their way good to the United States: several were compelled to fly to save their lives as a single word said against the government at that time was sufficient to hang them."

That anyone who says a word against the Government is, under British rule, always hanged out of hand is, of course, a commonplace. White knew—for "those who were brought prisoners from Fort George to York at the time we were brought in there on suspicion of being friendly to the American cause, were as I afterwards understood, hanged, and some even without

‡ This Major Rogers was not Major Rogers of "Rogers' Rangers," the famous scout of Indian times, whose exploits were the groundwork of Fenimore Cooper's "Leather Stocking," etc., but his son David McGregor Rogers, who came to Upper Canada after the Revolutionary War. He settled in the Bay of Quinte, then moved to Presq' isle (then called Newcastle), and finally to Haldimand Township, near what is now Grafton. He became Clerk of the Peace, Postmaster, Member of the Legislature, Judge of the District Court, Registrar of Deeds. When member he generally supported the Government, but was sometimes accused of radical principles. He was member of every Assembly (except one) from 1796 till 1824—for that one he refused to be a candidate as he had a claim against the Government. He was active throughout the war and was a zealous patriot. A man of principle and integrity, his descendants do no discredit to him, but are well known and estimable members of society.

judge, jury or the common formalities of a trial." That is the sort of people these devoted monarchists are—as every one knows.

While there is no official record of anyone in this part of Upper Canada deserting to the United States, there were a few further east, and quite a number further west who did so—there are records still extant in Osgoode Hall as to many of these.

On arriving at Kingston he was ordered into close confinement at Major Rogers' instance, "for the mere gratification of his vile disposition and the venomous hatred he bore to everyone who professed republican principles: at home he bore the name of a tyrant and was generally despised." He was certainly a very bad one. Why, even when poor White was lying sick at Ives' Creek he came and strutted about in the sick room and said that the British had taken Washington, and "he (meaning myself) may as well die now as at any other time, as that will be his fate at all events." The American took up the cudgels for himself and his country and "had the pleasure to see him depart in no very enviable humour." And certainly no one can say that the Major did not richly deserve all he got.

"Between York and Kingston * * * a distance of about 200 miles, I do not recollect having seen one town either situate on or in view of the lake."

He was soon sent off to Montreal—near the Seven Islands they met a fleet of 110 boats, two of them gun-boats, and "with the timbers of a vessel built in England even to the last pin, and ready to put together to enable them to retain their superiority on Lake Ontario." This is perfectly true: the Home Government sent out ships in parts to be put together on the great lakes—at many times the cost of building them on the shores of the lakes themselves. But these ships were supplied with water-tanks and apparatus for distilling fresh water for these bodies of water, supposed at Westminster to be salt. This the ships would, I fear, have lacked if they had been built in Canada.

White had made up his mind to jump overboard and swim for it if he got near the American shore, but "nei-

ther bribe (of \$500) nor persuasion could induce" the Captain "to alter his course." Some fat bullocks smuggled over from New York he saw bought by the British Commissary for \$20 a hundred, all in gold—not a bad price. A plan to escape failed, as the Lieutenant locked the door and stayed with the prisoner, and "pointing to a table upon which lay his sword and pistols, gave me to understand that he would kill me if I made an attempt to escape." This man must have been a monarchist, too.

Arriving at Lachine on the way to Montreal, the party had to walk the nine miles intervening—on the way they espied a snug little farm house: by good luck the farmer turned out to be an American, and "he handed down a decanter of old whiskey, requesting us to help ourselves," and gave the wearied travellers a good breakfast, for all of which he absolutely refused to receive any recompense. We are not told how much, if any, old whiskey was left in the decanter for the farmer.

Montreal does not seem to have taken to the prisoners; for "as we passed along the streets, the citizens crowded their doors and pavements, and pointing to me, cried out 'there goes an American officer: he's a d——d pretty creature, is n't he?'" No wonder Captain White "was exceeding wroth, and had my power been equal then to my will, I would have taken ample vengeance."

From Kingston to Montreal "are nine smart little villages, viz., Prescott, Youngstown, Edwardsburg, Williamsburg, Osnaburg, Cromwell, Dulac, Cidris, Vaudril and LaChine." These names are recognizable still—even "Cromwell."

Montreal then had a population of about 6,000, and had a considerable trade in furs.

Several plans were made for escape, but none was implemented—one because the firm of "Ballas & Gaits," who "had made a splendid fortune by smuggling business," would not lend "\$50 to \$100" to the captives.

The prisoners were soon sent to Quebec—during the voyage the Captain treated them kindly, seating them at his own table, giving them brandy and wine, and supplying them with playing cards. But "this * * *

was too good to last long, and in three days we reached Quebec." A good description is given of this "large and handsome town * * the capital of Canada." There they met a number of other American prisoners; but the stay was short, for orders came to remove to Halifax. A plot was formed to take the ship as soon as she had got out of the St. Lawrence, and to compel the sailors to work the vessel into New York, but they got inside the Halifax coasters too soon, and "having no particular propensity for swinging, we abandoned the project * *" Halifax does not seem to have been a bad place to live at, but prices had even a century ago gone up, for "Major Galloway and I paid \$2 at a tavern for a couple of glasses of brandy each, and some oysters which were so bad we were forced to leave them untouched." It is true we are not told the size of these four glasses of brandy: and it is more than likely that a Pennsylvanian palate was not educated up to Canadian oysters.

The Americans "were one day not a little shocked at the arrival of a number of American soldiers who were entrapped and taken with Col. Boerstler in Upper Canada at some creek between Fort George and Little York by the British and their allies the Indians."

Col. Boerstler had been prominent in the attack on the posts near Fort Erie, in December, 1812; he was placed in command of the detachment to attack Lieutenant Fitzgibbon's position at Twelve Mile Creek near St. Catharines in June, 1813. Warned by the famous Laura Secord, the British forces were prepared for the attack and met the American army with a vigorous fusilade. Boerstler was himself wounded and soon surrendered with his whole force, some 550 in all.

Toward the end of February, 1815, peace being proclaimed, all the prisoners were released and made their way homeward.

"The soil of the province of Upper Canada is exceedingly good in every part * * * from the head of the Bay Quantie to the head of Lake Ontario, it is altogether a black, light, rich mould in most parts seven inches deep after which it is brown clay." A description is given of Rice Lake, Lake Simcoe and other

waters, not very far from the truth, as well as of the Mountain Lake§ in Prince Edward County on the top of a mountain 200 feet high.

It is a matter of regret to read that "in some parts of Upper Canada through which I passed, the people did not appear to pay the least respect to the Sabbath day. I have frequently seen women churning butter and baking bread, and men chopping wood and attending to divers other employments the same as on week-days," but they got their deserts, these Sabbath-breakers, for they have only "a substitute for coffee * * viz., dry crusts of bread put on the fire and burnt black, then pounded fine and boiling water being poured upon it, it is suffered to rest for awhile when it is pronounced fit for use." Provisions of all sorts were "very scarce and dear. In * * Halifax beef was upwards of twenty cents per lb., turkey was fifty cents per lb., wheaten meal, though sour, was twenty-four dollars per bbl."

We leave Captain White at home in Adams County: our sympathy goes out to him on learning that when, at Boston, he called on the Pay Master for his pay, he could not get cash, but must take due bills—cashing these at the brokers he had to allow a discount of twenty per cent., some even twenty-five per cent. He took some Philadelphia paper, and when he went to pay his stage fare five per cent. more was deducted, thus "calculating the ten per cent. we paid at Halifax for borrowed money, twenty per cent. discount for cash at Boston, and five per cent. deducted by the stage proprietor made in all an allowance of thirty-five per cent. which we were compelled to pay." It must have been at least some satisfaction that the hated and despised Britisher got only ten of this, while those "who professed republican principles" got the lion's share of the prey.

§It is of this little lake (or another near it) that Smith in the work cited says: "It is very smooth. At different times the inhabitants have in the morning seen tracks, as if a large log had been drawn along from the bay to the lake. This was supposed to have been done by snakes."

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By

THE HONOURABLE MR. JUSTICE RIDDELL,
L.H.D., LL.D., &c.



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Some Early Legislation and Legislators in Upper Canada.

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It is a matter of regret that the early statutes of Upper Canada are not available for the ordinary practitioner: they are full of interest, historically and otherwise.

Of course, it is well known that at the time of the conquest of Quebec—and consequently of Canada—in 1759 and 1760, what was afterwards Upper Canada, was not settled. Accordingly, the proclamation of 1763 which introduced or purported to introduce the English law, civil and criminal, into Canada, did not practically affect that district. The Quebec Act of 1774, 14 Geo. III., ch. 83, did, however; for, before it was repealed, Upper Canada had a considerable number of inhabitants, chiefly from the revolting colonies to the south. This Act reintroduced the French civil law, although it left the English criminal law in full force. Much discontent was manifested by the English-speaking colonists of Upper Canada at being subjected to French law; and when the Act of 1791, 31 Geo. III., ch. 31, made Upper Canada a separate province, her first Parliament abolished the old Canadian or French law, and introduced the law of England for the decision of all matters of controversy relative to property and civil rights, and also introduced the English rules of evidence. This is found in the very first chapter of the statute of the first session of the first Parliament of Upper Canada.

The second chapter established trial by jury in all actions, real, personal and mixed, and authorized the jury, if so minded, to bring in a special verdict. In the French system the jury had no place; and the French-Canadian did not hesitate to express his wonder that the English should think their property safer in the determination of tailors and shoemakers than in that of their Judges.

The third chapter established "one just beam or balance, one certain weight and measure, and one yard, according to the standard of His Majesty's Exchequer in England." The lineal and superficial measures were the same then as now, but the gallon, etc., somewhat smaller, being the same as those still used in the United States.

Chapter 6 made a Court for small debts, the ancestor of the present Division Court. It authorized any two or more Justices of the Peace to sit and hold a Court, to be called a Court of Requests, on the first and third Saturday in every month, to try any claim not exceeding 40 shillings, Quebec currency. This was what was also known as Halifax or Provincial currency, a shilling equalled 20 cents. These Courts remained practically unchanged till 1833—their jurisdiction was extended in 1797, by 37 Geo. III., ch. 6, and in 1816 by 56 Geo. III., ch. 5—in 1833, by 3 Wm. IV., ch. 1, it was provided that Commissioners should be appointed by the Governor or Lieutenant-Governor to sit and hold the Court of Requests. This Act after being amended in 1837 by 7 Wm. IV., was itself repealed in 1841, by 4 & 5 Vict., ch. 3, which provided for Division Courts to be presided over by the Judge of the District Court of the District in which the Division Court was situated. This introduced substantially the present system. We shall have occasion to consider the District Court later.

Chapter 7 regulated the tolls to be taken in flour mills, fixing them at not more than one-twelfth. This has come down unchanged to the present time, R. S. O. (1897), ch. 140, sec. 1.

Chapter 8 provided for a gaol and court-house in every district. Lord Dorchester, the Governor of Canada, had, 27th July, 1788, by proclamation, divided what afterwards became Upper Canada, into four Districts, Lunenburg, Mecklenburgh, Nassau and Hesse. The Upper Canada Act which we are now considering, changed the names to Eastern, Midland, Home and Western, and directed that the gaols and court-houses should be placed in New Johnstown (Cornwall), Kingston, Newark (now Niagara), and for the Western district "as near to the present court-house, as conveniently may be."

In 1816, it was directed that the gaol and court-house for the Home district should be erected at York (now Toronto), 56 Geo. III., ch. 18.

We shall meet these Districts again, and pass over them for the time being.

Chapter 4, abolishing the summary proceedings in the Court of Common Pleas in actions under £10 sterling, and chapter 5, providing for the appointment of firemen, we also pass over.

The above constitutes the legislation of the first Parliament of Upper Canada during its first session at Newark beginning Monday, September 17th, and ending Monday, October 15th, 1792.

But there were other matters of great interest at this session.

On the 19th September, the Secretary of the Province presented for the consideration of the House, a signed and sealed instrument delivered to him by Philip Dorland of Adolphustown in the county of Lennox. This set out a "certain writ under the great seal of this Province of Upper Canada . . . directed to the returning officer of the County of Prince Edward and District of the Township of Adolphustown" requiring him "to send one knight girt with a sword, the most fit and discreet to represent the said County"; also an election by the freeholders, of Philip Dorland; that he, Philip Dorland, being "one of the persons commonly called Quakers," could not take the oath prescribed for members of the House, but he would make a declaration to the same effect. He then asked that if he could not sit without the oath, a new writ might issue. The House ordered a new writ to issue, as Dorland "was incompetent to sit or vote in the House without having taken and subscribed the oath set forth in the Act of Parliament."

On Saturday, September 29th, Mr. Colin McNabb, as preventative officer, was "ordered to attend at the Bar of the House to give information respecting the contraband traffic carried on in this district, as far as the same has come within his knowledge."

It is time, now, that we enquire into the personnel of the Legislature. Much of my information as to those I owe to two papers by C. C. James, Esq., C.M.G., LL.D., contributed to the Royal Society of Canada, in 1902 and 1903,—vol. 8, sec. 2, pp. 93 *sqq.*, and vol. 9, sec. 2, pp. 145 *sqq.*, respectively.

We may disregard Lord Dorchester, the celebrated Sir Guy Carleton, who was Governor-General of Canada—but

Lieutenant-Colonel John Graves Simcoe, the Lieutenant-Governor, is not negligible, for it is certain that he took a personal interest in much of the legislation.

There was a Legislative Council appointed by the Crown for life, and a Legislative Assembly to be periodically elected by the people; the electoral franchise was almost universal suffrage, as the qualification was placed very low—in counties, land worth 40 shillings sterling per annum, and in towns the possession of a dwelling house and lot worth £5 per annum, or being resident for 12 months and having paid rent to the amount of £10 sterling.

There was also an Executive Council referred to in an indefinite way in sec. 38 of the Act; the members were appointed by the Crown, and were not necessarily members of either House—they held office at the will of the Crown. They corresponded more nearly to the cabinet of the President of the United States than to anything now extant in the British world; and were not unlike the Privy Council as it then existed in England.

Of course, the Executive Council formed no part of the Parliament, but there can be no doubt of the accuracy of the following passage to be found in an address to the King by the Legislative Council, April 19th, 1836:—

“For many years the Legislative Council of Upper Canada consisted of but four or five members, connected with the Executive Government by the most confidential relations, and forming in reality a body scarcely distinct from the Executive Council of the Colony.”

A number of legislative councillors, four in all, had been appointed by the Home Government before Simcoe arrived in Canada. One of these was William Osgoode, who was the first Chief Justice of Upper Canada, and afterwards, in 1794, appointed Chief Justice of Lower Canada; he was an English barrister of good standing. Osgoode Hall is called after him.

Peter Russell was also appointed in England. He became Administrator of the Government in 1795, on Simcoe's resignation; and some scandal was attached to his name, arising from his practice of making grants of Crown lands to himself and his sister, while he was Administrator.

Alexander Grant was the only councillor appointed among the first lot who was at the time in Canada. He was commonly known as Commodore Grant. He also became

Administrator—this was in 1805, on the death of Lieutenant-Governor Hunter.

William Robertson had also been appointed; he had been a resident of Detroit, then and until 1796 part of Canada; but had gone to England in 1790, and never afterwards came to Canada. He resigned shortly afterwards, being in June, 1793, replaced by Eneas Shaw.

There were consequently only three councillors with Simcoe; and as the Act, 31 Geo. III., ch. 31, sec. 3, required at least seven councillors, these were not a majority—and consequently not a quorum—of the council. Accordingly Simcoe had James (Jacques) Baby appointed—he lived in Detroit, and was of a well-known French-Canadian family.

Osgoode and Russell arrived in Canada in June, 1792, and Osgoode, Russell, Grant and Baby were sworn in as members of the Executive Council at Kingston, in July, 1792—writs of summons calling them to the Legislative Council, were on the 16th of that month issued to these four, and also to Richard Duncan, William Robertson, Robert Hamilton, Richard Cartwright, Jr. and John Munro (of Matilda), Hamilton took part in the prosecution of Gourlay in 1819, and was said to have acquired 100,000 acres of Crown lands from the lots granted to sons and daughters of U. E. Loyalists. Cartwright was the ancestor of those of that name familiar in Canadian legal, military and political annals. He was the grandfather of Sir Richard Cartwright, and was even before his appointment to the Legislative Council, a Judge of the Court of Common Pleas (the Court of Common Pleas, we shall meet again). J. S. Cartwright, the present Master in Chambers, and J. R. Cartwright, the Deputy Attorney-General, are also grandsons.

Osgoode was the speaker of the Legislative Council, being appointed by the Lieutenant-Governor under sec. 12 of the Act; and Messrs. Baby, Hamilton, Cartwright, Munro, Grant and Russell all attended during the session.

A provision in sec. 6 for hereditary rank entitling to a seat in the Legislative Council, never was in fact brought into force.

On Monday, July, 16th, 1792, Simcoe issued a Royal proclamation, dividing Upper Canada into 19 counties; and directing the holding of elections for 16 representatives in the House of Assembly. We are sometimes apt to say that Ontario is divided into counties, and the counties into town-

ships; but historically, in many cases, the townships came first, and the counties were formed by a grouping of townships.

The counties formed by Simcoe's proclamation were: 1, Glengarry; 2, Stormont; 3, Dundas; 4, Grenville; 5, Leeds; 6, Frontenac; 7, Ontario; 8, Addington; 9, Lenox; 10, Prince Edward; 11, Hastings; 12, Northumberland; 13, Durham; 14, York; 15, Lincoln; 16, Norfolk; 17, Suffolk; 18, Essex; and 19, Kent. All these names are still used except Suffolk; but "Ontario" is now applied to a different part of the province: what is now Ontario was in those early times almost wholly destitute of inhabitants—"Ontario County" was then the islands west of the Gananoque river.

Glengarry had two members. For the first riding Hugh Macdonell was returned; for the second, his brother John, who became the Speaker of the first House. As he was a Roman Catholic, he occupied a dignity which he could not at that time occupy in any other part of the British Dominions, except Lower Canada. These two brothers were U. E. Loyalists, and were the maternal uncles of Lt.-Col. John Macdonell, who was Brock's *aide-de-camp*, and was killed with his chief at the Battle of Queenston Heights in the war of 1812. He was also Attorney-General of Upper Canada: a mural plate to his memory is to be found in the east wing of Osgoode Hall.

Stormont was represented by Lieutenant Jeremiah French, a U. E. Loyalist from Vermont.

Dundas sent Alexander Campbell, of whom little is known, or at least recorded.

Grenville sent another U. E. Loyalist, Ephraim Jones, the father of Jonas Jones, afterwards a Judge of the (King's) Queen's Bench: he had also two sons-in-law, who achieved the same distinction, Levius P. Sherwood and Henry John Boulton.

Leeds and Frontenac were allotted one member: John White, an English barrister, who had been appointed by the Home Government, Attorney-General of Upper Canada, and had come out in June, 1792, was by Simcoe's influence elected member. He was killed in a duel some years after.

Addington and Ontario sent Joshua Booth, a U. E. Loyalist, who died in the war of 1812.

Lenox, Hastings and Northumberland had one representative—and Lieut. Hazelton Spencer, also a U. E. Loyalist.

was elected. ("Lenox" was the spelling at that time; now the word is spelled with two n's).

Prince Edward and Adolphustown had one member (for the township of Adolphustown was detached from Lenox for electoral purposes). Philip Dorland was elected, but not taking the oath required by sec. 29 of the Act, 31 Geo. III., ch. 31 (as he was a Quaker) a new writ was issued, and Major Peter Vanalstine was elected in his place—they were both U. E. Loyalists.

Durham, York and first Lincoln sent Nathaniel Pettit, of Grimsby, a member of the Land Board of Nassau District.

The second riding of Lincoln sent Col. Benjamin Pawling, who had been in Butler's Rangers during the Revolutionary war.

The third riding of Lincoln sent Isaac Swayzie, who had been a noted scout on the British side. His enemies called him a "spy"—a mere difference in terminology. He later took a prominent part in the prosecution of Gourlay; and it is said narrowly escaped prosecution for the murder of William Morgan, who had threatened to disclose the secrets of Freemasonry, and who mysteriously disappeared. The mystery has never been wholly cleared up; but it was made evident that Swayzie had nothing to do with Morgan's abduction and death, notwithstanding his boast that he had.¹ He undoubtedly was a Freemason, however.

The fourth riding of Lincoln and Norfolk together had one representative. Parshall Terry was elected; he was one of Swayzie's bondsmen (v. the note) and afterwards was drowned in the Don in 1808, having removed to York when Simcoe made the change.

¹This is told of him in Dent's "Upper Canada Rebellion," and should be taken *cum grano*. That he had enemies was to be expected, and indeed is fairly certain; there is on record a petition by him, of April, 1790, to the Land Board of Nassau District, "setting forth that from his character having been traduced he had been prevented from enjoying the privileges of other loyal citizens." The Board found that he had produced sufficient proof that his character had been misrepresented; and held that he should receive the quantity of land his services entitled him to as a volunteer in the British army at New York.

He was not a member of the second Parliament. When that was in existence, the following misfortune befel him (or some other of the same name, unknown to fame) as appears by the *Terra Books* at Osgoode Hall: On Monday, April 20th, 1795, an information for sedition was filed by the Attorney-General, John White, against Isaac Swayzé, and a *capias* was granted to bring him before the Court to answer it. The Court of King's Bench, on that application, was composed of William Dummer Powell, Puisné Justice, and Peter Russell, sitting on Special Commission. On Wednesday, April 22nd, Mr. Swayzé appeared and pleaded "not guilty," giving

Suffolk and Essex sent Francis Baby, a prominent Canadian of French descent, and like the Macdonells a Roman Catholic.

Kent sent William Macomb and David William Smith,[†] the former of North of Ireland descent, and the latter, son of the commandant at Detroit.

This first session was held it is said by some—but there seems to be a doubt—in Freemasons' Hall at Newark (see note 10 post 36). The first name of what is now Niagara-on-the-Lake was Niagara, then it was successively called Lennox, Nassau and Newark. As Newark it was the capital of Upper Canada until after the selection of Toronto was made—the name being changed by Simcoe from Toronto to York in honour of the Duke of York, the King's brother. Newark had been chosen by reason of the proximity of forts held by the British; Simcoe expected that the British would continue to occupy the forts on the right side of the Niagara River. A guard from the 5th Regiment was kept on duty during the whole session—the Lieutenant-Governor attended in state accompanied by a guard of honour and opened Parliament by a speech from the Throne in traditional British form—and Upper Canada was fairly launched on her free career.

It was no doubt due to the presence of such lawyers as Chief Justice Osgoode and Attorney-General White in the two Houses, that the legislation is couched in such accurate and efficient language.

two sureties, Parshall Terry and Essai Daiton, in £50 each, himself in £100, to appear on Friday next to answer to the information against him. Friday, April 24th, a *venire* was directed to issue returnable Friday next to try the issue, and Mr. Swayzé gave new sureties, John Wilson and Samuel Pew. May 1st, a jury was sworn, whose names are given, and these, on May 2nd, "by their foreman, Andrew Templeton, find the defendant guilty." He then found sureties, William Reid and John Hainer, to appear for judgment the first day of Trinity Term, July 20th. On that day he entered into a recognizance himself in £200 P.M. (i.e., provincial money), and George Forsyth and Joseph Edwards in £100 each, to appear Friday, July 24th. There the Court sentenced him to pay a fine of £10 P.M. and stand committed until it should be paid, and also to enter into a recognizance with two sureties for his good behaviour for two years.

He afterwards was elected for the third, fourth, sixth and seventh Parliaments, dying in 1828.

The name is spelled "Swayzie," "Swayze," "Swayzé," "Suayze" and "Swayzy" in different places.

[†]David William Smith, Deputy Judge Advocate, of Newark, received a license dated at Navy Hall, July 7th, 1795, under the hand and seal-at-arms of Governor Simcoe, countersigned by W. Mayne, Acting Secretary, authorizing him to be and appear as an advocate or attorney in all and every of His Majesty's Courts. He afterwards removed to England, became a Baronet in 1821, and died in England, 1837, at the age of 73.

SECOND SESSION.

The second session of the first Parliament met at Newark, Friday, 31st May, 1793, the Legislative Councillors present being Osgoode, Russell, Grant, Cartwright, Baby and Hamilton. The session lasted till Tuesday, 9th July, and was not unfruitful.

The first chapter provided for the better regulation of the militia of the Province. Before this time a regulation passed at Quebec in 1777, had been in force, but it was now repealed: it had, indeed, given great offence even in Quebec, long before. It had provided for compulsory service on very insufficient pay, for payment at fixed rates for labour rendered, etc.; and generally had all the defects and faults and few of the advantages of a system of *corré*. It was petitioned against: and the attempts of Hamilton, the Lieutenant-Governor to enact a new militia law led to his recall in 1785.

War was in 1793 going on between France and England: the people of the United States (speaking generally) were strongly in favour of France, and although Washington issued a proclamation of neutrality, the people and the Government of Upper Canada lived in constant dread of an invasion from the south, a dread that was afterwards shewn to be fully justified by the war declared by the United States in 1812. This war it is now reasonably certain had for its main purpose the acquisition of Canada.

The speech from the Throne by Simcoe recommended an early remodelling of a militia bill on account of the war with France. The House did not delay, and by July 2nd they had agreed upon legislation.

This authorized the appointment of a Lieutenant in each county and riding with power to call out, arm, array and train militia once a year—each Lieutenant to appoint a Deputy-Lieutenant and “a sufficient number of Colonels, Lieutenant-Colonels, Majors and other officers” to do the training (we have seldom been lacking in colonels)—the militia to be composed of all male inhabitants from 16 to 50 years of age, and in case of emergency to be liable to be called on to serve in any part of the Province. Provision was made for division into regiments, companies, etc. Section 22 excused “the persons called Quakers, Mennonists and Tunkers” from serving, but they were to pay to the Lieutenant, each, per annum, 20 shillings in times of peace and £5 in time of actual invasion or insurrection. Special legisla-

tions for these classes of people will be found more than once in subsequent years.

The second chapter was the beginning of our municipal system, providing as it did for the election of parish or town officers. It authorized the inhabitant householders of any parish, town or township, reputed township or place to elect a parish or town clerk, assessors, collectors, overseers of highways, pound-keepers, town-wardens or church-wardens, high constables, etc.

Chapter three was the first of our assessment acts, and it also provided "for the payment of wages to the Members of the House of Assembly." Frequently we hear it said of Members of Parliament that they are the servants of the people; but we do not nowadays hear of them being paid "wages"—the sum paid them is dignified by the name "indemnity." But the blunt plebeian word was that used in England so long as the practice itself lasted. From the earliest times payment was made to Knights of the Shire and Burgesses: and in 1323, by Statute of 16 Edward II., the wages were fixed at four shillings per day for a Knight and two for a Burgess or citizen. These payments were made by the constituency, and continued regularly until the end of the reign of Henry VIII. When the time came to incorporate Wales with England, the Act of Parliament providing for representation of Wales, passed in 1535-6, 27 Henry VIII., ch. 26, provided that towns should pay wages to their representatives, and the second Act, passed in 1543-4, 34 and 35 Henry VIII., ch. 26, had similar provisions. When the universities received the right to send representatives to Parliament, it was provided that the burgesses were to be at the charge and costs of the Chancellor, masters and scholars: there is ample evidence that the members for the University of Cambridge in 1603-4, nearly if not quite the first to represent a university, were allowed five shillings per day for their expenses.

The practice gradually died out. The oft-repeated story that the well-known Andrew Marvell, who sat for Hull in the reign of Charles II., was the last member of the Commons to receive wages, is not true, for in 1681, three years after Marvell's death, King, who had been M.P. for Harwich, obtained a writ from the Chancellor for his expenses as member of the House. But so far as appears it may be con-

sidered that Marvell was the last to receive a regular salary in this way. Lord Campbell seems to think that the writ never was abolished, but could be claimed as of right. However that may be, the payment of wages to members died out in England more than two centuries ago, and they served without remuneration until the other day.

Many looked upon it as part of the constitution that the Commons should serve at their own expense, but it is not reported that any very dire calamity has followed the new measure.

It is to be noted that both in England and in Canada the present method is payment by the State; but as we shall see, the ancient method in England was followed in Upper Canada at first, and the constituencies were liable for the wages.

In the Irish Parliament, the practice of paying members also prevailed, the freeholders being assessed and the money collected by the Sheriff: in 1666 a Bill passed the Irish Commons abolishing wages for its members entirely; but this was rejected by the Irish House of Lords, and the old law continued until the Union in 1800.

In Scotland as early as 1587 there was statutory provision for wages to be paid to members by the freeholders; further legislation took place in 1648 and 1661. The "Commissioners" or members for shires were by this last Act to receive five pounds Scots (*i.e.*, 8 shillings and 4 pence sterling) per day. These wages were not paid after the Union with England in 1707, the last Act providing for them being in 1690; when, seventeen years afterwards, the Union came about, all wages and allowances from constituencies were allowed to lapse.

However, the "wages" given in 1793 in Upper Canada did not alarm by excess. Section 30, after reciting that "it was the ancient usage of England for the several members representing the counties, cities and boroughs therein, to receive wages for their attendance in Parliament," enacted that every member of the House of Assembly should be entitled to demand from the justices of the peace of the district in which his riding was situated, a sum not exceeding 10 shillings per day (*i.e.*, \$2) for each day he had been engaged in attendance on the House, and been necessarily absent from his house, the amounts to be paid out of the

rates. This was slightly amended ten years after by (1803) 43 Geo. III., ch. 11.²

Chapter four provided for laying out and repairing highways by the agency of Commissioners or overseers, the begin-

²That this provision for the wages of members of the popular House was not a dead letter is seen from the records at Osgoode Hall. For example: In Michaelmas Term, 59 Geo. III., Nov. 13th, 1818, in the Court of King's Bench (*praes.* Powell, C.J., Campbell, and Boulton, JJ.), a *mandamus nisi* was issued to the Justices of Gore, requiring them to issue an order to the treasurer of the district for the payment to Richard Hall, Esq., a member of the Commons House of Assembly of Upper Canada, of the sum of thirty pounds, being the amount of his wages for sixty days' attendance at the last session of the Provincial Legislature, out of the monies which may come into his hands under and by virtue of any Act of the Provincial Parliament. And a similar order to pay James Durand, Esq., Member of the Assembly.

These were made absolute April 17th, 1819.

Other instances may be of interest:—

"At a meeting of the Quarter Sessions for the District of Newcastle, holden at Haldimand, April 10th, 1804, at which were present Timothy Thompson, Benjamin Richardson, Asa Burnham, Joseph Keeler, Joel Merriman, John Spencer, Leonard Soper, Asa Weller, Elias Jones and Richard Lovekin, Esquires, the following order was made: "The Magistrates in Quarter Sessions assembled in the district of Newcastle, the 10th of April, 1804, order that the sum of forty-five pounds, ten shillings, be collected in the county of Northumberland to compensate David M. Rogers for services as Member of the House of Assembly for the years 1801, 1802, 1803, and 1804.

"(Sgd.) Tim'y Thompson,
"Chairman."

And on April 9th, 1805, this order was made: "Ordered that the sum of nine pounds, ten shillings, be collected in the county of Northumberland for the wages of David Macgregor Rogers, Esquire, Member of the House of Assembly, representing the counties of Hastings and Northumberland, for his services during the first Session of the Fourth Parliament.

"April Sessions, Haldimand, 9th April, 1805.

"Alex. Chisholm,
"Chairman."

On April 8th, 1806, the following: "Ordered that the sum of nine shillings and five pence halfpenny, be allowed in abatement to Benjamin Ewing, collector of the rates for the township of Haldimand, for the year 1805, for the rates of persons not living in the township. The Clerk of the Peace presented the following Assessment Rolls to the Magistrates for the townships of Murray, Cramahe, Haldimand, Hamilton, Hope, Darlington. Ordered that the clerk transmit a copy of the said assessments agreeable to law. Ordered that the sum of five pounds, fifteen shillings, Halifax currency, be collected for the payment of the wages of the Member of the House of Assembly for the second Session of the Fourth Parliament in the county of Northumberland.

"(Sgd.) Benjamin Richardson,
"Chairman."

On April 14th, 1807, the following: "Ordered that the sum of eleven pounds, five shillings, be collected for the payment of the wages of the Member of Assembly representing the counties of Hastings and Northumberland, for the third Session of the Fourth Provincial Parliament, being the proportion of Northumberland."

David M. Rogers was also Clerk of the Peace; he lived for a time in Prince Edward county and then removed to Grafton, Northumberland county. He represented his riding from 1796 to 1824, with the exception of one Parliament, and was active in military matters (as his descendants have been ever since). He became

ning of the wretched plan of leaving the care of highways to local authority.

Chapter five was of very great public importance. Before the conquest in 1759-60, of course, the Roman Catholic religion was practically universal in Canada, and there was no trouble in procuring the solemnization of marriage. Even after the conquest and until the influx from the United States, Protestants were few in number, and practically all lived in places of some importance like Quebec or Montreal, and a Protestant clergyman was there available. If a Protestant married in a country place it was to a "Canadienne," and her priest was good enough. But with the immigration into Upper Canada in considerable numbers of a country population, many of them Protestants, the situation was altered. By the law of England only clergymen of the Church of England could perform the ceremony, and these were scarce: according to a report made in 1792 by Mr. Cartwright, Legislative Councillor, there were none in the Eastern District, only two in the Midland, one in the Home and none in the Western. There were a few Presbyterian, Lutheran and Methodist ministers, and some Roman Catholic priests; but these were not qualified. Marriages had, however, been solemnized by these and in some cases even by laymen; and some relief was urgently needed. A Bill was introduced in the Council by Cartwright, which, with some amendments, became law.

This validated all marriages theretofore contracted between persons "not being under any canonical disqualification to contract matrimony," who publicly contracted before any magistrate or commanding officer of a post, or adjutant or surgeon³ of a regiment acting as chaplain," or any other

Registrar of Deeds for the united counties of Northumberland and Durham, and Judge of the District Court of Newcastle District: he died in 1824, aged 52.

The Act was interpreted with some strictness. When the Act of (1820), 60 Geo. III. ch. 2, authorized representation for towns in which the Quarter Sessions were held and which had a population of one thousand, and the town of Niagara sent Edward McBride as a member to the Legislative Assembly, the Court held, that he was not entitled to wages: *The King ex rel. Edward McBride, Esquire, M.P., against the Justices of the District of Niagara* (1826), Tav., 542. Members for towns had to serve without wages till 1835, 5 Wm. IV., ch. 6.

³ It seems to have been not unusual for a surgeon to tie the matrimonial knot, and it is not at all unlikely that the following instance accounts for the mention of them in the Act. Captain James Mathew Hamilton, of the 5th Northumberland Regiment of Foot, when stationed at Mackinac, married Louisa, daughter of Dr.

person in any public office of employment. For the future and until there should be five parsons of the Church of England in any one district, a J.P. might solemnize the marriage, using the form of the Church of England. It was of course quite too much to expect in the then existing state of religious toleration that any parson or minister of any other church or sect should receive such authority. The Lieutenant-Governor, Simcoe, indeed, wrote to Dundas expressing his astonishment that it had even been proposed to give such power to ministers of other denominations. At all events this proposition had to be abandoned. The Lieutenant-Governor did not like the Act which was passed, but public opinion was too strong for him and he assented to the Bill. Simcoe was most anxious for the establishment of the Church of England in Upper Canada, and bent all his energies toward that end.

The provisions of the bill were wholly unsatisfactory to many of the settlers. Some were Presbyterians who had come from Scotland, where their church was established and where Episcopalians were the dissenters; others were Lutherans whose church was established in parts of Germany. Many had come from the colonies to the south without an established church at all; not a few were members of the ancient Church of Rome, which had been the established Church in Canada till a few years before. None of these could see why their clergy were not quite as good as those of the Church of England. Petitions were signed and presented to the Lieutenant-Governor for a repeal of this marriage Act of 1793. These he treated with lofty scorn. He said that he thought it proper to say that he looked upon the petition as the product of a wicked head and a disloyal heart; but at length in 1798 an Act was passed, 38 Geo. III. ch. 4, making it lawful for a minister or clergyman of any congregation or religious community professing to be members of the Church of Scotland, or Lutherans, or Calvinists, to celebrate the

David Mitchell, Surgeon-General to the Indian Department, who performed the ceremony, as there was no clergyman of any denomination in that part of the country. The young couple were afterwards, *ex abundanti cautela*, remarried in 1792 by the Rev. Robert Addison, at Niagara. The entry in the marriage registrar of St. Mark's Church reads: "August 1792, Captain James Hamilton to Louisa Mitchell, his wife. They had been married by some commanding officer or magistrate, and thought it more decent to have the first repeated." The register was Mr. Addison's private book, but became the register of St. Mark's Church, Niagara, when that church was opened in 1809. Captain and Mrs. Hamilton were friends of Lieutenant-Governor and Mrs. Simcoe.

ceremony of marriage for members of their own congregation or religious community, upon the minister procuring a proper certificate from the Quarter Sessions.⁴ Similar marriages in the past were also validated. This was so little to the taste of the Lieutenant-Governor that he reserved the Bill for His Majesty's pleasure. The royal assent was given Dec. 29, 1798, and the Bill became law. This made the trouble if anything more acute. So long as one Church had the monopoly it was not so bad, but when four participated, all those who were excluded insistently demanded the reason why.

The agitation was at length successful. In 1830, by the Act of 11 Geo. IV., ch. 36, the power of celebrating marriages was given to clergymen and ministers of the Church of Scotland, Lutherans, Presbyterians, Congregationalists, Baptists, Independents, Methodists, Menonists, Tunkers or Moravians, the celebrant to take out a certificate from the Quarter Sessions.

The restriction to marriages of persons one of whom at least was a member of the denomination, was removed. Former marriages "before any justice of the peace, magistrate or commanding officer of a post, or before any minister or clergyman," were validated and confirmed unless either of the parties to an invalid marriage had thereafter contracted matrimony according to law.⁵

⁴How the license was obtained may be seen from a concrete example.

At a meeting of the General Quarter Sessions for the District of Newcastle, held April 9th, 1805, at Haldimand: Present, Alexander Chisholm, Robert Baldwin, Richard Lovekin, Elias Smith, senior, Asa Weller, Elias Jones, Benjamin Marsh, John Spencer, Benjamin Richardson, Leonard Soper, Joseph Keeler, Asa Burnham and Joel Merriman, Esquires, the following took place:

"Reuben Crandel of Cramahe, appeared, pursuant to notice given at the Clerk of the Peace's office, professing himself to be a Minister of the Religious Congregation of Calvinists, and having called upon John Spencer, Esquire, Moses Hinman, Joseph Phillips, Joseph J. Losie, Benjamin Ewing, Moses Doolittle and John Phinn, all of Haldimand, members of the said congregation who openly owned and acknowledged the said Reuben Crandel to be their Minister, and the Court being satisfied that he is regularly ordained according to the rules of that society, do allow him a certificate to enable him to celebrate marriage agreeable to law."

⁵The right to solemnize matrimony was of some value, and unauthorized celebrants were proceeded against criminally. I give one case:—

In Easter Term, 42 Geo. III., April 9th, 1802, before Elmsley, C.J. and Allcock, J., a rule was issued against John Wilson, calling on him to shew cause why "an information for a misdemeanour should not be filed against him . . . for having solemnized or pretended to solemnize marriage on the 7th day of June . . . last, between Paul Marin, of York, baker, and Jane Butterfield, of the same place, spinster, otherwise called Jane Burke, in contempt of

In 1857, by the Act 20 Vic. ch. 66, the power of celebrating marriages was given to ministers and clergymen of every religious denomination in Upper Canada; in 1896, by 59 Vict., ch. 39, also to an elder, evangelist or missionary of the "Congregation of God" or "Of Christ," *i.e.*, "Disciples of Christ," and also to a Commissioner or Staff Officer of the Salvation Army. Quakers are specially provided for.⁵

the law, contrary to the statute in such case made and provided, and in profanation of religion."

This last clause is especially fine.

The rule, after two enlargements, came on before the Full Court (Elmsley, C.J. and Powell and Allcock, J.J.), in Trinity Term, 14th July, 1802, and it was made absolute.

The information was a proceeding now practically obsolete, but much in use in those days in place of an indictment.

No doubt Wilson was tried upon the information ordered to be issued against him but I do not find any record of the result.

Rev. John Carroll, in the first volume of his "Case and His Contemporaries," p. 148, sec. 17, speaking of Rev. Isaac B. Smith, a Methodist missionary, says: "He was courageous. After his ordination he ventured to marry a couple within the Province boundaries, and was, consequently, prosecuted by the privileged class, who claimed the exclusive right to celebrate matrimony. Unlike the excellent but timid Sawyer, who for a time fled the country on a similar charge, being preferred against him, Smith stood his ground, searched into the law on the subject, plead his own cause, and despite the talents and legal lore of the prosecuting attorney, and the Judge's brow-beating, came off scot-free. In this he was more fortunate than his father-in-law, Mr. Ryan, who, according to report, was banished for a similar offence, though afterwards made a subject of the Governor's clemency for his known loyalty."

"Sawyer," was Rev. Joseph Sawyer, who became Presiding Elder of the Upper Canada District of the Methodist Episcopal Church in 1808, having then been a missionary for fourteen years.

"Mr. Ryan," was Rev. Henry Ryan, of great fame in the same Connexion, but who afterwards was a prominent leader in the division which took place in 1828-9, resulting in the formation of the Canadian Episcopal Methodist Church.

I have not been able to verify the statements made as to these three ministers: there is no doubt, however, that ministers of all denominations considered it a part of their clerical functions to perform the marriage ceremony, and resented the ban put upon such act by the law.

⁵ There was no dearth of denominations in 1830, when the former Act was passed.

William Lyon Mackenzie, in the Introduction to his "Sketches of Canada and the United States," 1833, says:—

"There is . . . variety enough, if we include the Canadas. Within a square of 400 miles may be found the professors of 100 religions, creeds and systems, from the Menonist, Tunkard, and Child of Peace of Upper Canada, to the Hopkinsian, the Chrystian and Universalist across the Niagara."

The Children of Peace consisted of thirty or forty families in or near the village of Hope, in the township of East Gwillimbury, about 35 miles from York, and 4½ miles from Newmarket. David Willson was their leader, but they had no written creed.

At an election at Niagara Falls, for the county of Lincoln, July 26th, 1824, Mackenzie says, p. 89: "there were Christians and Heathens, Menonites and Tunkards, Quakers and Universalists, Presbyterians and Baptists, Roman Catholics and American Methodists: there were Frenchmen and Yankees, Irishmen and Mulattoes, Scotchmen and Indians, Englishmen, Canadians, Americans and Negroes, Dutchmen and Germans, Welshmen and Swedes, Highlanders and Lowlanders."

The number of persons with this authority is fairly large; but no one is justified in getting up a little denomination of his own, and claiming the power to celebrate the marriage ceremony just because he is the minister of it. One Robert Brown tried that; he was the minister of a congregation known as "The First Christian Chinese Church, Toronto," and as such solemnized marriages. The Judge of the County Court of Toronto convicted him of the crime of unlawfully performing the marriage ceremony and the Court of Appeal affirmed the conviction: *Ree v. Brown* (1908), 17 O. L. R. 197.

Returning now to the Legislation of 1793.

Chapter 6 fixed the times and places of holding the Quarter Sessions in each District—in the Eastern District at New Johnstown and Cornwall, in the Midland at Adolphustown and Kingston, in the Home at Newark and in the Western at Detroit—also a Court of Special Sessions at Michilimackinac. Detroit was considered as part of Canada till 1796, and was governed accordingly—Michilimackinac was given up about the same time.

Chapter 7 is a most creditable piece of legislation. It practically abolished slavery in the Province, repealed for Upper Canada, 30 Geo. III., ch. 27, authorizing the importation of slaves into a colony. All negroes then slaves continued to be slaves, children of female slaves born after the Act served the master until the age of 25 years and then became free.

It was the Lieutenant-Governor who was responsible for pressing this legislation, though Chief Justice Osgoode and Solicitor-General Grey also deserve credit. It was by no means popular, on account of the scarcity of labour; and the old story of Canaan serving his brethren, Gen. x, 25, was made to do duty over and over again. But "the power of the Crown" was then something to be afraid of, and Simcoe got his wish.

Upper Canada had reason to be proud of her record in respect of Slavery. The number of negro slaves in the Province was not very large absolutely; but in comparison with the number of free settlers it was not insignificant; many had been captured by the Indians in their incursions into United States territory and sold to Canadians at a small price, and their labour was very valuable.

In the case of the negro *Sommerset*, to be found in 20 Howell's State Trials, 29, the Court of King's Bench in 1772 had unanimously decided that as soon as a slave set his foot upon the soil of the British Isles he became free. Cowper in *The Task*, in 1785, sang:—

“Slaves cannot breathe in England; if their lungs
Receive our air, that moment they are free;
They touch our country and their shackles fall.”

But that was in the mother country; in the Colonies the curse of negro slavery prevailed to an extent limited only by the opportunity of obtaining negroes and the supposed need for their labour. Wilberforce had only in 1787 taken up the cause—which had been a favourite for many years among the Quakers—of the abolition of the slave trade; but as yet no British Colony had spoken; and Upper Canada led the way. She had been indeed preceded in 1792, May 6, by Denmark, but she led the British Colonies and all other nations in abolishing this infamous traffic. It was not till 1807 that it was forbidden for all the British Dominions, and not till 1833 was the Act passed abolishing slavery itself. August, 1838, saw the end of slavery under the Union Jack.

Chapter 8 established a Court of Probate in the Province and a Surrogate Court in each District. The Governor, Lieutenant-Governor or Administrator was to preside in the Court of Probate, and a Commissioner in each Surrogate Court. An appeal lay from the Surrogate Court to the Court of Probate.

This system existed till 1858. In that year, by 22 Vic. ch. 93, the Court of Probate was abolished, a Surrogate Court for each county organized with a Judge with the same authority as a Judge of a County Court, and 33 Geo. III. ch. 8, was formally repealed. Our present system is substantially that of 22 Vic. ch. 93.

By chapter 9 the Lieutenant-Governor was authorized to appoint three Commissioners to consult and agree with an equal number from Lower Canada as to duties to be imposed in the passing of goods from one Province to another. This may be passed over for the time.

Chapter 10 provided for the payment of officers of the two houses. Chapter 11 for the payment of a bounty for killing bears and wolves, 10 shillings for a bear and 20 shillings for a wolf, but this was not to extend to the Western District nor was any Indian to receive any reward for such killing.

Chapter 12 provided for the appointment by the Governor of returning officers, in elections for the Assembly.

Chapter 13 provided for salaries of officers of the two Houses and for contingent expenses. This is the form; but the substance is rather different. By an Act of the Imperial Parliament in 1774, it had been provided that a duty of £1 16s. sterling should be paid for every license in the Province of Quebec for keeping a house of public entertainment or for retailing wine, brandy, rum or other spirituous liquor within the Province. The matter of duty upon wine and liquor brought into the Province had been up in the first session, but nothing came of the discussion. A bill passed the Assembly October 4th, 1792, but received the three months' hoist in the Council October 8th.

In 1793 the Committee of Ways and Means in the Assembly reported in favour of a retail license fee of £2 per annum, and a bill was introduced accordingly and was sent up to the Council July 2nd, 1793; and this bill, after some opposition, was passed by that body. As finally passed it imposed a further license fee (in addition to the former of £1 16s.) of 20 shillings for each retail license, but this was not to extend beyond April 5th, 1797. The Receiver-General was allowed to retain 3 per cent. for himself of all money raised by this method.

During this session, Peter Van Alstine, already mentioned, took the necessary oath, on the second day of the session. The day following it was ordered that such Acts as had passed or should pass the Legislature should be translated into French for the benefit of the inhabitants of the Western District and other French settlers who might come to reside within the Province, and A. Macdonell, Esquire, Clerk of the House, was employed as a French translator for this and other purposes of the House. Thus early we meet bilingualism.

A Bill to establish two annual fairs at New Johnstown did not pass; and the same fate met a proposed "Bill to relieve the inhabitants of the Western District from the necessity of bolting the grain they grind at their mills for toll."

The House was not unmindful of the privileges attached to the position of Member of Parliament. We find on Monday, 17th June, this resolution carried: "That the Speaker do inform W. B. Sheehan, Esquire, Sheriff of this district, that the House entertain a strong sense of the impropriety

of his conduct towards a member of this House in having served a Writ of *Capias* upon the said member contrary to his privilege, and that the House has only dispensed with the necessity of bringing him to their bar to be further dealt with from a conviction that want of reflection and not contempt made him guilty of an infringement upon the privileges of the House."

That the members of the Upper Canada House had the same privilege from arrest as a member of the Imperial House of Commons is certain—and that, not only during the sittings of the House, but for forty days before and forty days after: *Reg. v. Gamble and Boulton* (1832), 9 U. C. R. 546, and several other cases down to *Cox v. Prior* (1899), 18 P. R. 492. Accordingly the sheriff had reason to consider himself lucky in escaping the fate of others who had been guilty of somewhat similar acts.

Upon the first day of the first Parliament of James I. in 1603, a complaint was made that Sir Thomas Shirley, who had been elected a member of the House of Commons, was arrested four days before the sitting of the Parliament and imprisoned in the Fleet. A writ of Habeas Corpus was issued and he was discharged. Precedents were looked unto and the plaintiff at whose suit and the sergeant by whom the arrest was made were sent to the Tower. The Warden of the Fleet, who had persisted in refusing to obey the writ of Habeas Corpus and deliver up his prisoner, was ordered to be committed "to the place called the Dungeon or Little-Ease in the Tower." Afterwards "delivering his prisoner" and "upon his knees confessing his error and presumption and professing he was unfeignedly sorry, the Speaker pronounced his pardon and discharge, paying ordinary fees to the clerk and the sergeant." And in February, 1606, an attorney who had procured the arrest of Mr. James, a member of the House of Commons, and the officer who had arrested him, were "for their contempt committed to the custody of the sergeant for a month, which judgment was pronounced against them kneeling at the bar, by Mr. Speaker."

It is to be hoped that Sheriff Sheehan was duly grateful for the clemency shewn him.

On Monday, 8th July, the House waited upon the Lieutenant-Governor with their address to His Majesty, expressing their horror and abhorrence of "the sacrilegious murder in France," and hoping "that a conduct so baneful to every precept of Religion and law may serve to rivet the loyalty and

attachment of our fellow-subjects, as it has ours, to the best of Kings and of constitutions the most excellent." Louis XVI. had been executed the January before. This was "the sacrilegious murder," sacrilegious because Louis was King by Divine Right—and notwithstanding that his right to the Crown was statutory, the doctrine of Divine Right was dear to George III. It was, of course, George III. who was the best of Kings,⁷ and the constitution as it then existed unreformed, the most excellent of constitutions. Everybody knows that it was the perfection of reason acquired by long study, observation and experience, and refined by learned and patriotic men in all ages—as Simcoe in his speech from the throne put it, "equally abhorrent of absolute monarchy, absolute aristocracy or tyrannical democracy."

It may not be without interest to see who attended the meetings of the Houses of Parliament.

During the Session of 1792, the following Legislative Councillors are noted in the proceedings as being present at some time: William Osgoode, James Baby, Robert Hamilton, Richard Cartwright, Jr., John Munro, Alexander Grant and Peter Russell. In 1793 all these were also in attendance, and in addition, Richard Duncan attended, having been sworn June 17th, 1793. He had been appointed in the previous August, and hailed from Rapid Plat.

As is the case with the Legislative Council, I do not know of any record kept of the attendance of members of the Assembly; but from the proceedings it is clear that of the sixteen members elected for the assembly in the first Parliament at least thirteen were in attendance at some time during the first session. The names of all but Joshua Booth and Parshall Terry appear as taking some part—Philip Dorland, of course, could not act.

In the second session I find the names of thirteen recorded as taking some part in the proceedings, Major Van Alstine among them. Those whose names do not appear are Hugh Macdonell, Parshall Terry and Nathaniel Pettit.

This was a very fair attendance, but it does not seem that all attended every day, as Sept. 18, 1792, a resolution was

⁷ Wraxall tells us that it was King George's opposition to the claims of his American subjects that was the cause of his unpopularity with the English people; and it is, beyond doubt, true that as soon as peace was in 1783 declared, granting independence to the North American Colonies, he recovered all his lost favour with his people. There never was a King more generally loved than he, except during the years of the Revolutionary War.

passed that nine members should make a House; and this number was reduced on Oct. 10, to eight.

There had always been a difficulty in England of securing attendance of members of the House of Commons; and one statute, 6 Henry VIII., ch. 16, was passed punishing the absence of a member by deprivation of pay. No other punishment has ever been enacted in England.

Ireland was cursed with absentee members; in one instance it is said a member was an absentee for twenty years; but no means were taken to compel attendance.

In Scotland absentees were liable to a fine. It is said: "By ancient law absentees were liable to be unlauded and amerced in fines"; the fines were substantial, and "without prejudice of what further censure Parliament shall think fit to inflict."

In the Upper Canada Parliament there does not appear to have been any necessity for such measures.

THIRD SESSION.

The third session of the first Parliament began June 2nd and lasted till July 7th, 1794.

The first chapter of the legislation of this session regulated juries to be called to "serve on trials at any Assizes or Nisi Prius, Quarter Sessions or District Court." Not less than 36 nor more than 48 jurymen were to be returned in any District or place; those returned, if they did not appear, were to pay a fine not less than 20 shillings (\$4) or more than £3 (\$12). Section 9 provided that every jurymen should receive one shilling from the plaintiff or his attorney in every cause in which he was sworn—if a view should be allowed, six jurymen agreed upon or named by the Judge or some officer of the Court had the view and were allowed each 10 shillings for each day they were so employed. The Court of King's Bench was authorized to order a special jury to be struck as in England, the fee of each special jurymen to be 5 shillings.

Chapter two established a Court of Law by the name and style of His Majesty's Court of King's Bench for the Province of Upper Canada, with the same authority as the Courts of King's Bench, Common Pleas and Exchequer in England.

Before the conquest of Canada, of course the French system of Courts was the only system in Canada. From this

time until the Royal Proclamation of 1763, there were Courts presided over by the captains of militia. These Courts were set up by the conquerors as part of their military rule, and could only be temporary.

By the Proclamation of 1763, it was provided that the Governor should have the power of constituting Courts of Law and Equity with civil and criminal jurisdiction to hear and determine causes as near as may be agreeable to the laws of England. Murray, accordingly, pursuant to his instructions and his Commission, established a Court of King's Bench with civil and criminal jurisdiction with an appeal to the Governor in Council or to the King in certain cases—the Court to sit twice a year, in January and June, in Quebec—and a Court of Assize and Gaol Delivery once a year in Montreal and Three Rivers. A Court of Common Pleas was also established,—an appeal lay to the King's Bench, or if of sufficient importance to the Governor in Council or the King. Justices of the Peace were also appointed with civil jurisdiction up to £5 for a single magistrate or £10 for two sitting together. Three justices could hold a Court of Quarter Sessions with civil jurisdiction from £10 to £30.

Several departures from English precedent are manifest. The Common Pleas administered Equity, and Conservators of the Peace both singly and in the Quarter Sessions had civil jurisdiction.

Then came the Quebec Act of 1774, 14 Geo. III., ch. 83. This revoked the Proclamation of 1763, all ordinances relative to the administration of justice and all commissions to Judges, etc., made or issued under the authority of the Proclamation. It further provided for the King constituting Courts of civil, criminal, and ecclesiastical jurisdiction and appointing Judges and officers thereto.

The American invasion of Canada prevented anything being done at the time—*inter arma silent leges*—but in 1776, Courts were established for the Districts of Montreal and Quebec, and a Court of Appeal was also constituted. Courts were organized for Three Rivers, and afterwards, when in 1788, Dorchester divided what was afterwards Upper Canada into Districts, Courts were instituted also in these four Districts, *i.e.*, Lunenburg, Mecklenburg, Nassau and Hesse (this last including Detroit). These were Courts of Common

Pleas. Commissions of Oyer and Terminer were also issued to the Judges of these Courts, as occasion required.

Jury trial having been established by chapter 2 of 32 George III., chapter 4 of the same statute abolished summary proceedings in these Courts, which had formerly obtained in cases involving less than £10 sterling.

The time was now come to abolish these Courts of Common Pleas in Upper Canada, and chapter 2 of the third session became law. This constituted a Court of King's Bench, with a Chief Justice and two Puisné Justices (increased to four in 1837 by 7 Wm. IV., ch. 1) to sit at a place certain, *i.e.*, at the place where the Governor usually resided, and until such place should be fixed, at the last place of meeting of the Parliament. Four terms were prescribed: the first and original process directed to be a writ of *capias ad respondendum*; special bail also provided for, and the statutes of jeofails, etc., as in England, notice of trial, examinations *de bene esse*, costs, etc. The Courts of Common Pleas disappear and their records become records of the King's Bench. A Court of Appeal was constituted (composed of the Governor or Chief Justice and two or more members of the Executive Council) to which an appeal lay in matters over £100; and a further appeal when the amount in controversy exceeded £500 sterling was reserved to the Privy Council.

As indicating the nationality of the inhabitants of Upper Canada it may be mentioned that the notice to the defendant to be endorsed on the writ was required to be in French (according to the form given) when the "party defendant is a Canadian subject by treaty or the son or daughter of such Canadian subject": sec. 9.

This Court of King's Bench (becoming in 1839 by 2 Vic. ch. 1, Queen's Bench) continued until, in 1881, it was consolidated in the Supreme Court of Judicature. The former Courts of Common Pleas entirely disappeared in 1794, and the Court of Common Pleas created in 1849 has no relation to these whatever. In 1837 a Court of Chancery was established, presided over by the Vice-Chancellor of Upper Canada; and in 1849, 12 Vic. ch. 63, a new Common-law Court, the Court of Common Pleas, with the same jurisdiction and practice as the Court of Queen's Bench. At the same time the Court of Chancery was reconstituted with a Chancellor and two Vice-Chancellors, 12 Viet. ch. 64. These three Courts

continued side by side as the Superior Courts of original jurisdiction until 1881.

By the Act of 1794, as we have seen, the Lieutenant-Governor of the Province or the Chief Justice, with two or more of the Executive Council, constituted a Court of Appeal from the King's Bench, and the same Court became the Court of Appeal from Chancery in 1837; but in 1849 this Court of Appeal was abolished and a new Court of Error and Appeal was constituted to hear appeals from both the Common-law Courts and the Court of Chancery. This new Court was much like the Court of Exchequer Chamber in England, and consisted of all the Judges of the three Courts of first instance. In 1874, 37 Vic. ch. 7, this Court was reconstituted and thereafter consisted of Judges permanently of the Court of Appeal. In 1881, 44 Vic. ch. 5, the former system was abolished; all the Courts, Appeal, Queen's Bench, Chancery and Common Pleas, were united and consolidated into one Supreme Court of Judicature for Ontario, composed of two permanent divisions: 1, The Court of Appeal for Ontario (this had five Judges), and, 2, the High Court of Justice for Ontario; and of this High Court of Justice there were the three divisions, *i.e.*, the Queen's Bench, Chancery and Common Pleas Divisions. Later, another division was added in the High Court, *viz.*, the Exchequer Division. Each of these divisions of the High Court of Justice had three Judges. The still recent reform effected by the Law Reform Act, 1909, need not here be considered.

I shall later speak of the defects of the original Court. It may here be said, however, that William Dummer Powell, who had been commissioned as Judge of the Court of Common Pleas for the District of Hesse, and had actually sat as such at L'Assomption (Sandwich), was after the passing of this Act appointed a Justice of the Court of King's Bench, and was afterwards, in 1816, created Chief Justice.

As the Courts of Common Pleas were abolished, it became necessary or at least advisable to constitute Courts to take their place for the trial of causes involving small amounts. In the Legislative Council, Cartwright and Hamilton caused to be entered in the proceedings their formal protest against the one Superior Court for the Province, rather than Courts of local and exclusive jurisdiction in each District.

A Court was by Chapter 3 constituted in each District, by the name of District Court, to sit where the Court House

had been (by 32 Geo. III., ch. 8), directed to be built, except "in the Western District, where the said Court shall be holden in the Town of Detroit." In 1796, by 36 Geo. III. ch. 4, s. 3, it was declared no longer expedient to hold the Court in Detroit, and it was directed to be held at the Parish of Assumption (Sandwich), or nearer the Isle of Bois Blanc—in 1801, by 41 Geo. III., ch. 6, s. 2, the place was definitely fixed at Sandwich.

The District Courts were given jurisdiction in all actions of contract from 40 shillings up to £15; this was in 1797, by 37 Geo. III. ch. 6, sec. 1, increased to £40 in cases of contracts where the amount is liquidated, and to £15 in trespass where the title to land was not brought in question.

After several amendments, the legislation was consolidated in 1822 by 2 Geo. IV., Sess. 2, ch. 2, and again with amendments in 1845 by 8 Vic. ch. 13. At length in 1849 the Districts became so multiplied that their boundaries in many cases became identical with the boundaries of Counties, and the Statute 12 Vic. ch. 78, abolished the division of the Province into Districts for judicial and other purposes and the District Courts were made County Courts by sec. 3. In the Statutes for that year they are called sometimes County Courts, sometimes District Courts and sometimes District or County Courts, but thereafter the new name, which still continues, is consistently used.

Chapter 4 authorized the Governor to grant a license to any number of His Majesty's liege subjects not exceeding sixteen, to act as attorneys and advocates in the Province. The reason for this was the scarcity of lawyers acquainted with the English Civil law in the Province. Before 1792 of course the English Civil law had not been in force, at least in theory. This Act of 1794 suspended for two years for Upper Canada the ordinance made in Quebec in 1785 providing for the profession. The Act was not abused—only some five gentlemen were licensed under it in 1803, one being D'Arcy Boulton, an English barrister who afterwards became Judge of the King's Bench, and the ancestor of a distinguished family; another, Dr. William Warren Baldwin, a prominent barrister and politician, and father of the still more celebrated Robert Baldwin.

The formation of the Law Society of Upper Canada in 1797 we shall have occasion to note when we reach that date.

Chapter 5 provided for the accounting for all fines, etc.

Chapter 6 was an assessment Act of no great consequence except that it ordered the payment in full of the wages of the members of the Assembly.

The Militia received attention in chapter 7, which authorized Cavalry and a Navy.

Chapter 8 enabled the householders of every District at their annual town meetings to determine in what manner and at what periods horned cattle, horses, sheep and swine, or any of them, should be allowed to run at large, and permitted impounding of the offending animals.

Chapter 9 amended the Act of the previous session as to highways, and was equally futile.

Chapter 10 allowed the inhabitants of the Eastern District to build a gaol (it is called in the Statutes a "goal") and Court House in Cornwall, as well as those in New Johnstown authorized by the Act.

Chapter 11 laid a duty on "Stills for the purpose of distilling spirituous liquors for sale," 1 shilling and 3 pence per gallon of the capacity of the still. The owner must procure a license, paying a fee for it of course; no one could do anything in those days without paying a fee for it—except (possibly) die.

Chapter 12 regulated the manner of licensing public houses, requiring the keeper to procure a certificate of his fitness from the magistrates of the District—the magistrates were given the power to limit the number of inns and the names of all licensees were to be published in the *Upper Canada Gazette*.

A bill to regulate the practice of physic and surgery passed the Assembly, but the Council amended it in such a way that it did not suit the Assembly; a conference was directed to be held, but nothing seems to have been done, and the bill did not pass this year. It had better luck the following session, 35 Geo. III. ch. 1.

In the Council during this session the following Councilors are noted as taking part: Osgoode, Baby, Hamilton, Cartwright, Munroe, Grant, Russell and Aeneas Shaw, who presented his summons and was sworn in, June 10, 1794. He was a Scotsman, the lineal descendant of Macduff, first

Thane of Fife: of great mental and bodily vigor, he served in the Revolutionary war, and was created a Major-General in Upper Canada. At his house, Oakhill, he entertained the Duke of Kent, father of Queen Victoria, during his tour in Canada in 1799. The Major-General died in 1813 during the war with the United States, it is said from over-fatigue.

We have not the complete record of the Assembly of this Session—the only available copy extending only to June 11th; in what is preserved, I find the names of twelve members mentioned as taking part—Speaker Macdonell, Hugh Macdonell, Alexander Campbell, Ephraim Jones, John White, Joshua Booth, Hazelton Spencer, Benjamin Pawling, Isaac Swayzie (this name is spelled Swayzé in the report), Parshall Terry, David William Smith; no trace is found of Jeremiah French, Peter Van Alstine, Nathaniel Pettit or William Macomb, although they all may have been in attendance.

FOURTH SESSION.

The fourth session of the first Parliament also met at Newark like its predecessors; it lasted from July 6th to August 10th, 1795. We have no records of the proceedings except the statutes themselves.

The first chapter regulates the practice of physic and surgery. I have thus spoken of it in a paper prepared for the Ontario Medical Association, and published in the "Canadian Journal of Medicine and Surgery," September, 1911:—

* At the time of the separation of our Province, and for some time thereafter, there was no regulation as to who should practice medicine, or "physic," as it was called. Many of the practitioners were old army or navy surgeons; some were importations from the United States, but most of those who treated disease were mere empirics. There had, indeed, been an Act or Ordinance passed by the Council of the old Province of Quebec in 1788, forbidding anyone to practise without a licence from the Governor—which licence was to be granted without an examination to all graduates of any British university and to all surgeons of the army or navy; but this was largely a dead letter in the newer parts of the colony, as our country was at that time.

In 1795 the Provincial Parliament of Upper Canada passed an Act, 35 Geo. III. ch. 1, forbidding the sale of medicine, prescribing for the sick and the practice of physic, sur-

gery or midwifery by anyone who had not been licensed. The Governor was to appoint a board to examine all who should apply for a licence, and those approved of by the Board, upon the examination were to be granted a licence, the fee being £2 currency, *i.e.*, \$8. A penalty of £10, *i.e.*, \$40, was imposed for selling medicines, prescribing for the sick or practising physic, surgery or midwifery without a licence. An exception was made for surgeons or surgeons' mates in the army or navy, and for those who had been practising at the time of the passing of the Act of 1791; these, however, were not to take apprentices or students. There is no record of anything ever having been done under these provisions: the Act was found unworkable, and it was accordingly repealed in 1806 by 46 Geo. II. ch. 2, and the profession was again much at large, although the Act of 1788, already spoken of, was still nominally in force. Much public dissatisfaction was the result, and at length a new Act was passed in 1815, 55 Geo. III. ch. 10, which forbade prescribing for the sick or the practice of physic, surgery or midwifery without a licence—saving the case of graduates of a university in British Dominions, surgeons and surgeons' mates in the British Army or Navy, and those who had practised before 1791. The prohibition against these taking apprentices or students was not repeated in this Act, nor was the prohibition against selling, *etc.*, medicines. And it was expressly provided that women might practise midwifery without a licence. The Governor was to appoint an examining and licensing Board.

Nothing seems to have been done under this Act either, and it was repealed in 1818 by 59 George III. ch. 13, which, however, contained much the same provisions."

I do not here trace the legislation further.

Chapter 2 prohibited any person coming from any place not within his Majesty's Dominions at the time of the passing of the Act, and not being a *bona fide* subject of His Majesty for seven years before the passing of the Act, from voting for a member of the House and from being a candidate. This was to meet what was then and for some years thereafter a very real danger. Americans coming into Upper Canada, with a hatred of monarchical institutions, obtruded themselves among the voters, preached, and, where they dared, practised disloyalty.

Chapter 3 ratified an agreement entered into with Commissioners from Lower Canada as to the division of certain

duties, and an agreement that the Upper Province would not impose duties upon goods imported into Lower Canada and passing into Upper Canada, receiving one-eighth of the duties levied thereon by Lower Canada.

Chapter 4 gave jurisdiction to the Court of King's Bench similar to that of the Court of Exchequer in England in the case of goods seized or contraband. This jurisdiction proved of very great value: the old Term Books are full of cases of confiscation of goods seized as being smuggled.⁸

Chapter 5 is the first of our Registry Acts, establishing a registry office for each county and riding. Memorials only were to be registered, not the deed, etc., itself.

FIFTH SESSION.

The fifth and last Session of this Parliament met May 16th, and lasted till June 3rd, 1795. No records of the proceedings other than the Statutes are extant.

Chapter 1 regulated the weight, etc., of coins and their rating as legal tender.

British Guinea . . . weighing 5 dwt. 6 gr. Troy=£1 3s. 4d.
Johannes of Portugal..weighing 18 dwt. 6 gr.

Troy=£4 0s. 0d.

Moidore of Portugal..weighing 6 dwt. 18 gr.

Troy=£1 10s. 0d.

The milled Doubloon or four Pistole piece of

Spain weighing 17 dwt. Troy=£3 14s. 0d.

The French Louis d' or (before 1793) . . . weigh-

ing 5 dwt. 4 gr. Troy=£1 2s. 6d.

Etc., Etc.

American Eagle..weighing 11 dwt. 6 gr. Troy=£2 10s. 0d.

American Dollar=£0 5s. 0d.

⁸ For example, we find in Michaelmas Term, 49 Geo. III., Nov. 14th, 1808, before Scott, C.J., and Powell, J.: In "*The King v. John Young*, on the information of Wm. Frith, Esquire, Atty-Gen'l, proclamation is made in open Court for condemnation of goods seized as forfeited. The Atty-Gen'l suggesting that it is his intention, on the part of the Crown, to take the goods in specie, this, on proclamation, is, by the Court, considered deficient." Trinity Term, 50 Geo. III., July 11th, 1810, proclamations were made for condemnation of goods seized as forfeited: 106 gals. of brandy, 75½ gals. of rum, 1,000 lbs. of tobacco, 60 lbs. of tea, 50 lbs. of tobacco, called pegan, 88 lbs. of snuff, and 50 lbs. of cotton wool; also 226 gals. of whiskey, 1,600 lbs. of pork, 120 gals. of gin, and the boat tackle and furniture. In Michaelmas Term the proclamations were renewed and, finally, judgment was given for forfeiture.

Many other gold and silver coins are named and valued. The value given to the American dollar shews that in Canadian currency 1 shilling=20 cents (what was known even in my day as Halifax currency).

Counterfeiting was made felony punishable with death on conviction "in His Majesty's Court of his Bench." Uttering, for a first offence, one year's imprisonment and one hour in and upon the pillory in some public and conspicuous place; a second offence was punishable with death as a felon without benefit of clergy. Importation of false coin was to be punished by twelve months' imprisonment. No one was to be compelled to take more than 1 shilling in copper; every payment exceeding £50 currency in gold coin was to be by weight.

Chapter 2 provided for juries at the assizes.

Chapter 3 made further provision for licensing inn-keepers.

Chapter 4 altered the place of meeting of the Quarter Sessions and the District Court of the Western District from Detroit, as has already been stated. Detroit was definitely abandoned by the British the following year, under the provisions of "Jay's Treaty," 1794.

Chapter 5 abolished the bounty for killing bears. Chapter 6 provided for Commissioners to treat with Commissioners from Lower Canada as to duties, etc., and chapter 7 further secured those "wages," so often spoken of.

This is the by no means discreditable or insignificant record of the first Parliament of Upper Canada, the only Parliament under Simcoe.

I shall now say something as to some of these statutes.

There was very great reason for the protest of Cartwright and Hamilton. They had caused to be entered upon the proceedings of the Council 3rd June, 1794, a formal protest against the proposed Act which effected the abolition of local Courts, in the geographical situation of the colony, "with a thin population scattered over so immense an extent of country"—all writs issuing from the "fixed place" at which the Court sat, and all proceedings to be there filed. It was indeed provided that where the first process went to the Sheriff of the Home District, fifteen days should elapse between the teste and return, forty days in any other District. But the necessity of "day's journeys" in procuring process, etc., must in the then

condition of the colony have been very annoying; and many must have wished the return of the old Common Pleas Court in their District. But in 1797, by 37 Geo. III. ch. 4, it was provided that the Clerk of the Crown and Pleas should have in every district an office and a deputy whom he should furnish with blank writs, and in which office pleadings should be filed; moreover, a form of writ where special bail should not be required was given. This was made quite clear in 1845 by Statute 8 Vic. ch. 36; it was enacted that the Clerk of the Crown should supply his deputies in every district with writs of *mesne* and final process, except writs in ejectment, and the deputies were directed to issue such writs in the same manner as might be done in the principal office at Toronto. They were also authorized to issue rules upon the Sheriff for return of *mesne* or final process. Then in 1849, the Act 12 Vic. ch. 63 altered the office of Clerk of the Crown and Pleas, and made the several Clerks of the County Courts *ex-officio* Deputy Clerks of the Crown and Pleas in the Queen's Bench and Common Pleas—so that at length there was in each county town an office where process could be sued out. Thus, most of the advantage of a local Court and all the advantage of a strong central Court were combined.

In the Statute concerning coins, reference is made to standing in the pillory. This time-honored punishment in the English law might be a triumph for the prisoner, or a capital punishment, according to the feeling of the populace. I find instances of the punishment being actually inflicted or at least ordered in Upper Canada, *e.g.*, a case mentioned by Read in his life of Chief Justice Elmsley, page 46: a prisoner convicted at New Johnstown of perjury, Sept. 11th, 1793, was sentenced to be pilloried three times.⁹ The pillory was abolished with us in 1841, by 4 and 5 Vic. ch. 24, sec. 31.

⁹A case well known to all students of the Constitutional History of Canada is the following:

In Michaelmas Term, 60 Geo. III., Nov. 8th, 1819, *The King v. Bartimus Ferguson*, the prisoner was sentenced to pay a fine of £50, province currency, and to be imprisoned in the common gaol at Niagara for 18 months; in the first of these months he was to stand in the Public Pillory between the hours of 10 a.m. and 2 p.m. At the expiration of the term he was to give security for good behaviour for seven years himself, in £500, and two sureties in £250 each, and to be imprisoned until the fine was paid and security given.

(Present: Powell, C.J., Campbell and Boulton, JJ.)

The prisoner's counsel was Mr. Thomas Taylor, the reporter and editor of Taylor's Reports, called in Hilary Term the same year. He himself was the editor of the Niagara Spectator, and in his journal, in his absence from home, had appeared a letter written and

A second conviction for uttering, meant felony "without benefit of clergy." No lawyer is at all likely to think with some popular writers that this means "without the benefit of clerical attention and advice." Of course it originally was the privilege allowed to a Clerk in Holy Orders, when prosecuted in the temporal Courts, of being discharged from such Court and turned over to the ecclesiastical Courts—in other words to get clear almost altogether. This privilege was gradually extended to all who could read, and many a notorious rascal escaped well-merited punishment by reading his "neck-verse," possibly by a recently learned accomplishment. Ultimately, in 1706, by 6 Anne, ch. 9, the privilege was extended to all, whether they could read or not.

This privilege did not extend to all felonies, but only to capital felonies, and even of these some were "without benefit of clergy"; moreover, by an early statute (1488), 4 Henry VII., ch. 13, laymen allowed their clergy were burned in the hand, and could not claim it the second time, and the practice grew up of imprisoning for life clergymen where the offence was heinous and notorious.

"Benefit of Clergy" was abolished in England by sec. 6 of the Criminal Law Act of 1827, and in Upper Canada in 1833 by 3 William IV., ch. 3, sec. 25. This Act provided that all crimes made by the Act itself punishable with death—murder and accessory before the fact to murder, rescue of one committed for or found guilty of murder, rape, carnal knowledge of a girl under ten, sodomy, robbery of the mail, burglary, arson, riot after the reading of the Riot Act, destruction of His Majesty's dockyards, etc. (a sufficiently long list indeed)—should be so punished, but that all other felonies should be punishable by banishment or imprisonment for any term not exceeding 14 years. Thus the counterfeiter escaped the punishment of death, to the great grief of many very good and very intelligent people who thought that a death sentence for the offender was the only safeguard for society.

Simcoe returned to York at the close of the fifth Session; a short time after his arrival, he received an answer to his request of the previous December for leave of absence on the ground of ill-health. His request was granted in most flattering terms. Causing Peter Russell to be sworn in as Admin-

signed by Gourlay, animadverting on the Administration of the day. Ferguson was indicted for libel, and found guilty, with the result we have seen. On his making a humble submission, he was relieved of some part of the penalty and imprisonment.

istrator, he left York for Quebec, and thence sailed for London in September, 1796, never to return. After effective service in the West Indies, he died at Exeter in 1806.

A man of great force of character, a devoted patriot, holding his Church entitled to loyalty second only to his King, a soldier of valor and capacity, his mistakes were for the most part the mistakes of his time and his rank, and he well deserves the encomium of his epitaph in Exeter Cathedral, that "in his life and character the virtues of the hero, patriot and Christian were eminently conspicuous."

Of the Executive Council I have said little; that body took no part in legislation. All its members, however, were Legislative Councillors.

In the Houses, even at this early date, we see differences of opinion, the Council inclining to the aristocratic, the Assembly to the democratic view. The embryo of an opposition also makes its appearance, even in the select body. Hamilton and Cartwright seem to have acted together—we have seen that they joined in a protest against the formation of a great central Court, the King's Bench; Simcoe had no hesitation in calling Hamilton a republican, and Cartwright he thought little, if any better. The custom of dubbing a political opponent a traitor began very early in Upper Canada. Simcoe also intimated that Cartwright's position as Judge of the Court of Common Pleas for his District had something to do with his objection to the abolition of these Courts. However, Hamilton was created Lieutenant of Lincoln, and Cartwright of Frontenac, by the Lieutenant-Governor; so we may judge that his suspicions of their loyalty were but temporary.

This was the only Parliament which met at Niagara—Simcoe had changed the old name into Newark. The first session was held, it is said, in the Freemasons' Hall,¹⁰ all the others in what Simcoe calls "sheds"—additions built to the Barracks of Butler's Rangers by the garrison.

Simcoe recognized that Newark was too close to the border to be the permanent capital; in 1793 he made a some-

¹⁰ Some say that the first session of Parliament was holden in "a marquee tent, one remove in the scale of ascending civilization from the aboriginal council-lodge," some, that Navy Hall was the scene of the meeting.

William Dummer Powell, Chief Justice of Upper Canada, says, in his MSS. Narrative, now in the possession of his great-grandson Aemilius Jarvis, Esquire, of Toronto, that the House met in canvas houses, which had been prepared for and used by Banks and Solander, in their voyage of discovery, i.e., with Captain Cook, 1768-1771.

what extended trip into the interior, and decided that a spot at or near to what is now London should be the future capital. In the same year he fixed on Toronto as a suitable place for fortification. He changed its name to York, in consideration and compliment of the Duke of York's victories in Flanders. The Duke of York was a brother of George III., and had, earlier in the year, achieved some success against the French; but he was recalled not long after, and placed in charge at London. He was no great General, but as Administrator he was a success, doing much for the comfort of the soldiers, whether on active service or on pension.¹¹

Dorchester, the Governor-General of Canada, overruled Simcoe's selection of a site for the capital, and chose York, which, with a change to its old name of Toronto in 1834, remained such—with intermittent intervals after the Union of the Canadas in 1841-1842—till the present time.

The second Parliament met at York, not at Newark.

The state of legislation as left by the first Parliament deserves consideration.

The security of the Province from foreign aggression was, so far as was possible, secured by the Militia Acts providing for infantry, cavalry and navy.

Simcoe rather favoured the formation of a hereditary aristocracy who should have the right of being Lieutenants of their counties. This fortunately did not come to pass, but like the provision in the Act, 31 George III., ch. 31, looking to hereditary seats in the Legislative Council, was allowed to pass out of notice. Upper Canada has never been favourable to hereditary titles.

The loyalty of the Members of Parliament was secured by excluding aliens from House and electorate. Payment to members also had been provided for on a moderate but sufficient scale.

The Courts were practically what they are now, with the exception that in civil matters all Judges are now, even in the case of petty claims, trained barristers. The Courts of

¹¹ Every lover of Sir Walter Scott will remember, in the amusing introduction (1819), to the first edition of the "Legend of Montrose," his description of Sergeant More M'Alpin, who was induced to remain at Gandercleugh when on his way with his sister to Glasgow to take passage to Canada. The Sergeant, an old pensioner, "seldom failed to thank God and the Duke of York, who had made it much more difficult for an old soldier to ruin himself by his folly than had been the case in his younger days."

Requests, presided over by magistrates, corresponded to our Division Courts; the District Court to our County Courts; the King's Bench to the High Court Division of the Supreme Court of Ontario. The ultimate Court of Appeal was then composed of laymen, or it might be so constituted, and this was certainly objectionable—while the Court of King's Bench had the defects already referred to. The English law was introduced, civil as well as criminal.

Standards of weight and measure, coin, legal tender, had been set and fixed, tolls in mills regulated, provision made for killing dangerous wild animals, tavern and distilling licenses had been regulated, former invalid marriages rendered valid, and provision for the future solemnization of marriage made; practitioners in the Courts were also provided for, and physic and surgery not forgotten. In addition to the ordinary Courts of law, a Court of Probate with Surrogate Courts was provided. The criminal law was not neglected, meetings of the Quarter Sessions were arranged for and Court Houses and gaols directed to be built. A satisfactory adjustment was made with Lower Canada through which practically all imports came, except those from the United States. The curse of slavery was doomed to early extinction—a result in itself well worth all the first Parliament of Upper Canada cost in time, labour and money.

The first foundations of our municipal system were laid—afterwards to play such an important part in our national life. A later Governor called municipal corporations “Sucking Republics”: they are not that, but assuredly they are the very nursery for public spirit and capacity to say effectively what a freeman thinks.

For a beginning, the provision for the registering of documents must be considered creditable. The Registry system now much elaborated has been invaluable in saving trouble and money.

I should not omit the provision for highways. It must be said that highways under local and municipal control have not been a brilliant success. Much of the failure has no doubt been due to the rich soil of a great part of the Province. A reverend gentleman who was stationed at Thornhill in the third decade of the nineteenth century, complained that

there were no stones to make a road with.¹² It may have been that nothing better could be devised, but there can be no doubt that the roads of the Province have been no credit to us. What could be done by a central authority is seen in what was done. Practically the only roads which deserved the name were those built by the Government—Yonge Street, built by the soldiers, Dundas Street from Burlington Bay (Coone's Paradise) to London, and then from Burlington Bay to Toronto, built in the same way; the Danforth Road built on contract by Danforth, an American, in 1799-1800, from York to the Bay of Quinte.

The neglect of municipalities led to the formation of companies to build toll-roads, plank or gravel, of which many were incorporated in the 30's and 40's—and their works do follow them even to the present. Perhaps there is nothing which pays a country better than good roads; and it is to be regretted that for so many years road building was neglected.

But everything cannot be done by a poor country, and perhaps no better solution offered itself to our first log slaters. And when all is said, they certainly have earned the admiration and gratitude of all who have lived in the Province since their time.

¹² "Observations on Professions, Literature, Manners and Emigration in the United States and Canada . . . in 1832, by the Rev. Isaac Fidler, for a short time missionary of Thornhill on Yonge street, near York, Upper Canada, London . . . 1833."

In this most entertaining volume, written by a clergyman of the Church of England, is found the following:—

"I must here explain . . . that the roads in many parts of Canada are composed entirely of earth, of a rich soil, among which no stones or gravel is intermingled. Many farms along Yonge street, of two hundred acres in extent, have not so much stone on them as would serve to lay the foundation of a house. This is a proof of the fineness of the land: but also of the paucity of materials for making solid and substantial turnpikes. . . . The heavy rains make a road a complete puddle, which affords no sure footing to man or beast."

Most Upper Canadians have seen such roads; and they are not few or far between now, eighty years after Mr. Fidler wrote.

A BANQUET

tendered by the

Augusta Bar Association

TO

WILLIAM HOWARD TAFT

President-elect of the United States

His address, with the other speeches on that occasion, together with a
paper on "Trial by Jury" read by Hon. Andrew J. Cobb
before the annual meeting of the Association

AT

AUGUSTA, GEORGIA

January 12, 1909

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AUGUSTA, GEORGIA

January 12, 1910

THE Tenth Annual Meeting of the Augusta Bar Association began January 11, 1909, with a banquet at the Bon Air Hotel, in honor of William Howard Taft, President-elect of the United States.

The other guests present were: Chief Justice Benjamin H. Hill, of the Court of Appeals of Georgia; Arthur Powell, Associate Justice of the Court of Appeals of Georgia; Richard B. Russell, Associate Justice of the Court of Appeals of Georgia; Hon. Emory Speer, Judge of the United States District Court; Justice William R. Riddell of the High Court of Justice for Ontario, Canada; Hon. Charles P. Taft, Cincinnati; Hon. Andrew J. Cobb, ex-Justice of the Supreme Court of Georgia; Hon. Joseph M. Brown, Governor-elect of Georgia; Hon. Frank H. Hitchcock, of Newton, Mass.; Hon. John Hays Hammond, of Washington; Hon. Jonathan Bourne, U. S. Senator from Oregon; W. W. Mischler, Esq.; Hon. Thomas W. Loyless, and Hon. Bowdre Phinizy, Augusta; Hon. Alexander Akerman, U. S. District Attorney, Macon; Philip P. Johnston, Esq., Waynesboro.

The following members of the Augusta Bar were present as hosts of the distinguished guest and company.

Irving Alexander	J. E. Harper
W. H. Barrett	F. F. Harrison
J. C. Black	E. R. Hill
J. C. C. Black, Jr.	J. M. Hull, Jr.
Archibald Blachshear	G. T. Jackson
Judge E. H. Callaway	E. G. Kalbfleisch
F. W. Capers	Judge Joseph R. Lamar
M. P. Carroll	W. P. Lamar
Inman Curry	B. B. McCowen
C. H. Cohen	S. H. Myers
R. S. Cohen	P. C. O'Gorman
Bryson Crane	H. Phinizy
Major Joseph B. Cumming	C. P. Pressley
Bryan Cumming	B. E. Pierce
C. E. Dunbar	Wallace Pierce
Judge W. F. Eve	A. F. Purdy

O. R. Eve
 W. H. Fleming
 D. G. Fogarty
 J. J. Foster
 A. L. Franklin
 Joseph Ganahl
 S. F. Garlington
 Judge H. C. Hammond

J. S. Reynolds
 N. M. Reynolds
 Judge H. C. Roney
 W. O. Tarver
 J. S. Watkins
 Boykin Wright
 J. J. Zachry

It had been arranged that after President Taft's address, and in compliment to him as a great and distinguished Judge, all the toasts should be responded to by those who were presiding in Federal, State, Local and Foreign courts.

Hon. J. C. C. Black, President of the Augusta Bar Association was toastmaster, and from the time he introduced "Our brother lawyer, Hon. William H. Taft, formerly of Hamilton County, Ohio, now of Richmond County, Ga.," until he adjourned to the regular annual meeting of the Association at the Court House on January 12th, there was good cheer, good fellowship and enthusiasm.

In introducing Judge Taft, Major Black said:

Brethren of the Augusta Bar Association:

I congratulate you upon this occasion which will remain a memorable event in our history, because honored by the presence of the President-elect of the United States. Called to that exalted station by the suffrages of his fellow-countrymen, as such, he is entitled to the respect of every citizen of our common country and the patriotic and loyal support of every section and party, in the discharge of the difficult and arduous duties of his office. We pay him this tribute more gladly because his large and varied experience in the public service, his intellectual ability, his broad patriotism, his high moral worth, eminently equip him for the highest office in the gift of the American people. His personal and official integrity, his unselfish

patriotism and his capacity have been tested and established by the distinguished public services he has already rendered, and which, without this last and highest honor, would entitle him to a place among the illustrious men who have adorned our history. At home and abroad, in high public stations the most arduous and difficult, he has always and everywhere put duty before desire, and the public before private interests. We tender him, officially and personally, our best wishes in meeting the grave responsibilities of the office into which he is soon to enter.

Our city has heretofore given public reception to two presidents of the United States. Washington, first among them in the order of time, and first in public esteem, was once welcomed here by such public demonstration as befitted his illustrious character and services. Later our people, without regard to party distinctions and differences, paid universal and enthusiastic tribute to the lamented McKinley, whose untimely and tragic death shocked the civilized world and shadowed every hearthstone in the land with sorrow. We have come in a narrower circle, but no less genuine and enthusiastic feeling, to pay our tribute to one worthy in every respect to sit in the official seat once filled by Washington and McKinley.

The interest of this occasion is intensified by the fact that it is peculiarly our own. Our guest is not only the President-elect of the United States, but one of the most distinguished members of our profession: a profession that has made such rich contributions to all that constitutes the pride and renown of our institutions at home and abroad, in laying the foundation and building the structure of our government, so firmly laid and so wisely built, we may hope that they shall ever remain a blessing to ourselves and our posterity and an inspiration to all people everywhere who aspire to, and struggle for the blessings of free government.

The maintenance and enforcement of law and order are to our social and political institutions what it has been said the Coliseum was to Rome: "While stands the Coliseum, Rome shall stand; when falls the Coliseum, Rome shall fall." This maintenance and enforcement must, in the future, as in the past, be largely dependent upon that profession from whose ranks come those who make and interpret and enforce law and order. Of the twenty-six Presidents of the United States, seventeen were members of the legal profession.

In this connection I may recall the fact that the roll of our own Bar bears the names of a signer of the Declaration of Independence, two signers of the United States Constitution, a judge of the United States Court, six United States Senators, six members of Congress, six Governors, one Foreign Minister, two Cabinet officers, four judges of the State Supreme Court.

His study and training as a lawyer and the judicial temperament acquired on the bench, especially equip our guest for the just and wise consideration of the great questions he will be called upon to determine. It is, therefore, with unusual pride and pleasure we tender to him this most cordial, but imperfectly expressed appreciation of the honor he has done us by his presence on this occasion, and with all our hearts welcome our Brother Taft, sometime of Hamilton County, Ohio, now of Richmond County, Georgia.

Judge Taft, as he arose to address the gathering, was given a most enthusiastic greeting, the members and guests rising to their feet and receiving him with outbursts of continued and repeated cheers.

ADDRESS

William Howard Taft

President-elect of the United States

“Major Black and Gentlemen of the Richmond County Bar:

“I am greatly honored to-night by being taken into your professional circle. I am glad to know—rather, glad to feel—that you do not think that because I have been in politics for the last nine years I have lost my claim to having been a lawyer. I hope it is true that once a lawyer always a lawyer. But I think I have seen in the careers of other men, and doubtless it has happened in my own, that the diversions and temptations of political life possibly take away the close reasoning, certainly the familiarity with legal decisions and legal principles, that one in the active practice of the law always has. However, it never takes away, if the man ever has had, a proper sense of his responsibility as a member of the Bar and a high appreciation of the high office that he performs in the community, and also an understanding of the character—the average character—of the members of the bar—his sense of brotherhood with every lawyer who honors his profession.

“I presume that in meetings of each learned profession it is a common and usual thing for its members to exalt its office and the standing and usefulness of its members, but I venture to think that in the meetings of the Bar the arguments upon which may be based the claim that the country has more—certainly in a governmental and political way—to expect from the legal profession than from any other profession, is true. We have always played a great part in the history of free governments.

GREAT QUESTIONS AHEAD.

“We have always played the most important part in the construction and maintenance of free governments,

and the present is a time when it seems to me that the importance of the office that we perform as lawyers and judges has never been exceeded.

"We are looking forward—must look forward—during the next decade or two decades or three decades to a test of our present institutions and present method of civilization, to the question whether the institution of private property is one worthy of being preserved and to the test, as well, whether the courts and the lawyers behind the courts shall maintain themselves in the economic and political struggle that we are likely to have with forces opposed to our present institutions.

"The institution of private property, I have had occasion to say a number of times and I don't hesitate to repeat it, next to that of personal liberty, has had more to do with the progress of civilization, with the uplifting of the human race, than any other institution that we have in our community. But we have reached a time when we must recognize certain limitations which previous conditions did not require the assertion of in the form of statutory law upon the use of private property, wherever it is represented in combinations of capital.

"We must recognize to-day that those combinations may be hurtful and it must fall to our profession, through arguments in court and by the judges themselves and by the arguments of lawyers in legislatures, to lay down the line of limitation which shall interfere as little as possible with individualism and freedom of property on the one hand, and shall stay the progress toward injurious combination and injurious monopoly on the other.

A LAWYER'S QUESTION.

"That, I believe to be a lawyer's question. That, I believe to be the problem that must be worked out, not through denunciation, not through mere rhetoric and eloquence, but by the careful consideration of the opera-

ion of the limitation as it shall be stated in a statute and interpreted by a court.

“The problem is now on, and therefore I state it with considerable solemnity and seriousness. We have got to work it out more or less by experiment, but in that working out we have got to depend upon the clear-headed lawyer, both at the Bar and on the Bench and in the legislature, to seek a successful solution, and I have no doubt that it will come.

THE MAJESTY OF THE LAW.

“Now your Chairman has been exceedingly kind—much too kind—in his references to me. In no atmosphere do I feel so much at home as in the atmosphere of lawyers and judges. We have been passed through the same mold. We have the same ideals. We have that profound respect for law and authority that is at the basis of the Government, and that we must instill in all citizens if we are to have government at all; not that we are without appreciation of the necessity for amendment and change of the law, but that we are charged with the belief that it is necessary to have an ultimate authority all the time, and that ultimate authority represented in the judgment of the court must be for the time obeyed until it shall be reversed by higher authority or until the statute shall state a different rule of law.

AS TO HIS AMBITION.

“Now I did not get into the position that I occupy now with malice long aforethought. I had very different ideas of what I should like to be than what I am likely to be.

“I had eleven years experience on the bench, and the delight of approaching questions, and their solution, from the standpoint of a judge, with utter indifference as to the result, except that of reaching the right result, was one that so deeply impressed itself on my mind that I have

most reluctantly given up all hope of ever indulging in that pleasant duty again.

“My own conviction is that the judge has a greater opportunity for usefulness, and will continue to have as we go on to meet the issues that are passing on us of a legal and economic character, than any other officer in our Government.

“I think as you look back into the past there is no man in the history of the Government whose work will live, and has lived—I don’t care whether it be President, General, or any other officer—as the work which was done by John Marshall and his associates in the construction of the Constitution,—[applause]—and to give up an ambition of that sort is to give up something that I long had cherished now to become a mere Executive.

“Still there is something that the Executive has to do with reference to judges. He has the duty and the power to nominate them, and with the consent of the Senate, to appoint them, and there is no more sacred duty that the President of the United States has than the selection, nomination, and appointment of the Federal judiciary, and if I cannot sit on the Bench to gratify the earnest desire I have had, at least I can make it as earnest an effort as the sacred duty obliges me to do, to select the best judges that I can for the discharge of the important duties that fall to Federal judges. [Applause.]

CHARACTER OF THE JUDGE.

“As to the character of the judge: We have present with us a distinguished judge from Canada, (Mr. Justice Riddell,) and he suggests the English system, where they have barristers and solicitors and where the Bar of active barristers is a very limited one, a Bar in which the rank of each active practitioner among his fellows—and that includes the Bar of all England—is settled, so that it is not a difficult thing for the Lord Chancellor, in

advising the Premier or the judges to appoint, to select the right men and to be sure that they are of the rank, experience and ability that such places ought to command.

“But in our country we have no division into solicitors and barristers. We are all lawyers and every one eligible to appointment, and it makes it exceedingly difficult for the Executive, especially in the appointment of the local judges—and I regard them only less important than the supreme judges—to secure the men who have the standing at the Bar, the experience and the ability that they ought to have to step up upon the bench and administer justice in the community where they live.

“One could describe the various qualities that a judge ought to have, but perhaps in such description he would fail to find any one who came up to it.

“Of course, honesty goes without saying. Impartiality does not always go without saying. The power to hold judgment until you hear from both sides is not always born in a man. Sometimes the habits of advocacy at the bar have unfitted men to occupy the judicial position, brilliant as they are.

“The power of industry, of application, is another indispensable quality to a great judge as a useful judge. The care with which the judge seeks to make his impartiality and his sense of justice and his desire to hear both sides apparent to both sides, I regard as one of the important qualities of a judge, for the appearance of justice is almost as necessary in these days, when courts are attacked—and I suppose they have always been attacked; I don't know that these days differ from other days in that respect—as the doing of actual justice. And so that requires, it seems to me, in a good judge a great deal of the diplomatic and tactful spirit which shall enable him to bring home to each of the parties before him the belief that what he is deciding is sincerely his judgment, unbiased by anything except the rights of the case.

AN EXECUTIVE'S DIFFICULTIES.

"Now, when the President comes to make the selection and tries to fill an ideal like that in a distant State and distant district, with which he has but little familiarity, he consults the letters that are written by enthusiastic friends of the different candidates. Is it any wonder that at times he goes astray? And when, with deference to the members of co-ordinate branches, there may be some political obligation to repay in a judicial appointment, is there not great danger that he may fall into error?

"When I look forward to those difficulties I tremble at the responsibility of the discharge of that particular duty of the Chief Executive.

"Still, the duty has to be discharged, and all that can be done is to get as much information as possible and use it in the best way.

"I have spoken of this because I think this is a subject that addresses itself to every member of the Bar, and I have spoken here, now initiated as a member of the Richmond County Bar, asking for the compassionate consideration of my brother-members of the Bar, when during the next four years you shall hear of judicial appointments, to know that if mistakes have been made they have been mistakes of judgment and not mistakes out of a lack of appreciation of the importance of the appointments to be made and of the powers to be exercised by the appointees.

"The Federal judiciary, of course, are appointed for life, and that makes one feel about as embarrassed as when choosing a wife, because after you have gotten a man confirmed and appointed you cannot get rid of him.

"I think possibly if we had had one or two impeachments in the history of the country, it might have been healthier for the entire Bench than as it is now, for we have

had very little of that disciplining of the Bench. Having been on the Bench, I can speak with some degree of freedom with respect to judges, more, perhaps, than some of you gentlemen who have not been on the Bench.

"But now to come back again to my relation to the Richmond County Bar. I did not come down here to make speeches to lawyers. I did not come down here for any other purpose than to rest and breathe in your good air and get as much exercise as I could in preparation for the burdens of office that are to come.

"And if I had properly performed my duty I should have expressed to your distinguished chairman, Major Black, when he came to tender your kind hospitality to me, the view that I ought not to accept it.

"But the temptation to meet brother-members of the Bar and publicly to testify to the very deep gratitude I feel to you all for your cordial welcome here, overcome what would doubtless have been better judgment.

"But I could not give up the opportunity of shaking hands with you all, of meeting you as a brother-member and of saying to you, gentlemen of Georgia, how deeply sympathetic I am with the entire Bar of the country and that I am no stranger either to Southern Bars, for I had Kentucky and Tennessee in my jurisdiction and I once administered justice in the Court of Appeals between one of General Morgan's men and one of Forest's cavalry, and I had to exercise as much restraint as I could to prevent them from giving too federalistic a construction to the Constitution.

"I want to say to you, gentlemen of the Bar, that I am deeply grateful to the lawyers of Augusta for their kindly reception, and I shall retain the memory of this delightful meeting to-night my whole life long."

The President's address was listened to with profound attention. At the conclusion of the prolonged applause

which it evoked, Judge Speer, of the United States District Court, responded to the toast, "The Federal Judiciary." It has been impossible to obtain a copy of his remarks, but he most eloquently pointed out that there were no differences between the State and Federal judiciary. If there were times when there were differences, it was that caused by receivers, not by the courts themselves. He was proud of the cordial relationship between the State and Federal courts, and expressed the belief that in the place of the State judiciary and Federal judiciary there should be set up an "American judiciary." He spoke in the highest terms of the juries in this State. His tribute to the South and the patriotism of the Georgia people won for him an outburst of applause.

THE GEORGIA JUDICIARY

Chief Justice Hill,

Georgia Court of Appeals

"Mr. Toastmaster, Judge Taft, Gentlemen of the Augusta Bar :

"The serenity of my usual Sabbath day reflections was rudely interrupted on yesterday afternoon by the shock of a telegram from my friend Hon. Boykin Wright, notifying me that I would be expected to respond on this occasion to the toast, 'The Georgia Judiciary.' When I thought of the magnitude of the subject and the learned and distinguished lawyers whom I was to address, I wondered how I could do justice to it and interest my audience within the proper limitations of a post-prandial speech. The eloquent tribute to the judiciary generally to which we have just listened, however, has left me only a few practical thoughts with local application.

"I have said that the Georgia judiciary was a subject of magnitude. To begin with we have some thirty-six

hundred justices of the peace, and no consideration of the judiciary would be complete without some allusion to these important branches of the judicial trunk. According to the Supreme Court of this State, 'a justice of the peace is a man of consequence in his neighborhood. He writes the wills, draws the deeds, and pulls the teeth of the people,' and performs divers important domestic services for his neighbors, and gathers around him a wondering crowd of eager listeners to catch the words of wisdom that fall from his venerated lips.

"Next are the one hundred and forty-seven ordinaries, or judges of probate, who guard the estates of the dead and care for the rights of the widow and orphan. Ordinary in title, but extraordinary in the fidelity with which they discharge their high trusts.

"There are also seventy-one city court judges presiding over courts of original and unlimited jurisdictions as to all suits wherein exclusive constitutional jurisdiction is not vested in the superior courts. The superior courts are the most important and august tribunals of original jurisdiction in our State, having exclusive jurisdiction in equity, land cases, divorces, and the life and liberty of the citizen. The judge, in his circuit, commands the respect and admiration of every citizen, and is deemed a marvel of wisdom and legal lore. His semi-annual charge to the grand jury is an event of educational interest, and is regarded as essential to peace and good order.

"The judicial history of our State is luminous with the records of many great lawyers who have adorned the circuit bench, and I do not recall one who, by injustice, graft, or immorality has ever placed a stain upon the proverbial purity of the judicial ermine.

"Then, as the newspapers usually say, there is our 'High Court'—the Supreme Court—organized in 1846 with three judges, its increased burdens now demanding the constant labor of six. All have honored the State,

and many have been jurists of great power and erudition, from the learned and scholarly Nisbet to the profound and philosophical Bleckley. It is with pleasure that I see present two former representatives of this court who voluntarily retired from their exalted positions, to the regret of the bar and people, and to the great loss of the bench, whose careers in the service of their State add luster to the bright and spotless escutcheons of two of Georgia's honored families that have given to the State and nation many great lawyers, famous jurists, and eminent statesmen.

"I hesitate to say anything about the youngest judicial offspring of our State, the court over which I have the honor to preside, for 'self praise, you know, is half scandal.' The Court of Appeals was created to relieve the Supreme Court of the burden of work that was killing some of the judges and driving others from that bench, and to insure to every litigant a hearing in a court of last resort. When I tell you that all three of the judges of this court are here tonight in normal mental condition and in fairly good health after a two years' struggle with the errors of the seventy-one city court judges, the manifold intricacies of certioraries, and the grave responsibilities involved in criminal appeals, you will concur in the opinion that they possess considerable physical strength and some little intellectual endurance.

"The judiciary of Georgia, Sir, has always been and still is, a band of underpaid and unselfish patriots fighting under the stainless banner of justice, recognizing only one leader, the law. Permit me, Mr. Toastmaster, to digress somewhat from the subject of my toast to say that not only the bench of this State, but of the entire country, proudly claim the distinguished guest of the evening as one of its most brilliant luminaries. He has won the applause of statesmen and the gratitude of his countrymen for wise and valuable work in another department of our

great Government; but nowhere has this service been more signal or resplendent than when, as a Federal judge, he held in just and juridic equipoise the conflicting demands of capital and labor, and resisted the assaults of the demagogue and the lawless upon the statutory and inherent right of the judiciary. You have, Judge Taft, spoken of the high mental and moral qualities which a judge should possess. Doubtless, in tender consideration of the judges present and to prevent a flood of resignations, you have stated that your enumeration was not exhaustive. You have spoken of the difficulty confronting the President in making wise selections for judicial positions, and have intimated that sometimes the President was imposed upon by representations of politicians who were intent upon paying political debts rather than maintaining the high standard of the judiciary. If you should ever feel troubled or perplexed in making a wise selection, let me beg you to remember that the claims of Georgia have been unjustly overlooked by your distinguished predecessors, for, notwithstanding the abundance and richness of her judicial material, I do not recall that one of her sons has ever sat upon the Supreme Bench of the United States. The Empire State of the South still has many brilliant and profound lawyers, both on the bench and at the bar, and it probably would not be difficult to persuade one to accept a 'call' to the world's greatest court. 'A word to the wise is sufficient.'

"Judge Taft has spoken of the responsibilities of the judicial office. Let me say that these high and important duties cannot be properly discharged without the assistance of an intelligent and upright bar. Courts must rely upon the learned and conscientious lawyer for success. Without such assistance the labors of the bench would be unbearably onerous and the decisions of the courts would possess little juridic value. It gives me pleasure to state, speaking for myself and my two able and distinguished

associates, that the members of the Augusta Bar measure fully up to the high standard here indicated. Whenever the Augusta Circuit is reached, we feel like a weary traveler who has reached a refreshing oasis in an arid waste of monotony; and in listening to the lucid arguments, or reading the exhaustive briefs of such lawyers as Black, Cumming, Wright, Barrett, Fleming, Branch and many others equally deserving of mention, the burdens of the judicial office are temporarily lifted and its duties become pleasant and inspiring. It is a great honor to preside over such a bar, and in the person of my well-beloved friend, Henry C. Hammond, the honor is well bestowed. May the white light of his official career linger long in Georgia's judicial firmament.

I cannot resist the impulse to say, Judge Taft, that your temporary sojourn in the South before assuming the duties of your exalted station was indeed a happy thought, and your selection of this beautiful city was little short of inspiration. You have found here the highest type of that chivalry and civilization which made the Old South beloved and honored, and here you have also seen that honorable industry and patriotic aspiration that is adding each day to the New South power, wealth and strength. When your fortunate neighbors of a few weeks soon bid you farewell, I doubt not, in recalling the culture, courtsey and considerate attention of the sons of Augusta, and the grace, beauty and charm of her daughters, you will feel the full truth of that patriotic exhortation uttered by Mississippi's great Democratic Senator over the grave of Massachusetts's great Abolition Senator: 'My countrymen, know one another, and you will love one another.'

“Major Black has given many reasons why the people of the South should affectionately honor the distinguished guest of the evening. Permit me to state one that he did not mention. It is because he likes us. He has said it, and no man can look in his face and doubt the sincerity of his

heart, or feel the pressure of his hand and question his pledge of friendship.

"Sir, Georgia and the South were ready for your coming. They reciprocally greet your words of kindness, and willingly take your proffered hand. They feel that your kindly overtures are inspired by a patriotic desire to lead the people from sectional dead issues of an unhappy past, and divide them only on practical living questions in national fraternal emulation. Since your loving and tender McKinley, standing in the city where your Sherman was 'a little careless with fire,' thrilled the hearts of the listening multitude with that noble sentiment of patriotism that not the South alone, but the entire nation, should care for the graves of those who wore the gray and died for the 'Lost Cause,' the leaven of love has been leavening the hearts of our people. We are ready to join you in every patriotic endeavor and unite with you in every patriotic aspiration that looks to the benefit, the advancement and the glory of every part of our common country. May the non-sectional wisdom of your administration re-incarnate in their sons the spirit of their revolutionary sires, so that there may be a renaissance of that patriotism which proudly shared in all the mutual glories of the past, and will even enjoy together all the glories of the future."

"Together, shouts Niagara in thunder-toned decree;
 Together, echo back the waves upon the Mexico Sea;
 Together, sing the sylvan hills where old Atlantic roars;
 Together, boom the breakers on the wild Pacific shores;
 Together, cry the people, and together it shall be,
 An everlasting charter-bond, forever for the free."

THE LOCAL JUDICIARY

Judge Hammond,
Superior Courts of the Augusta Circuit

Gentlemen: But for the dread of appearing rude or or unappreciative, I should have said in answer to your invitation to speak, ‘Oh, leave me off.’ It’s like popping a cap after cannonnading. We have been so well watered and fed, so charmingly instructed and entertained that the processes of digestion, mental and physical, should not be impaired by another word. This impulse of mine does not mean that I fail in the slightest to appreciate the dignity and responsibility of the office it is my honor, for the time, to fill.

“I realize that I am called upon, officially as it were, to welcome our distinguished guests and to make a few observations from the viewpoint of a Georgia Trial Judge.

WELCOMES MR. TAFT AND OTHERS.

“It is not often that a star falls in one’s front yard, but to have one drop down and stay here for weeks, shake hands heartily with everybody in reach, speak cordially to everybody in hearing, to smile kindly on everybody in sight, is enough to make the community do most anything but go Republican. It is whispered around that our local committee is going to get special leave of the State committee—not to go Republican—Oh, never, but just to go Taft! Mr. Taft, I have spoken to every man at the table about it and it is submitted by all that beginning on the fourth of March the Union will endure for at least four years longer; that our domestic relations will be free from infelicities, or as free from infelicities as those kind of relations ever get to be; that our foreign

relations will remain peaceful unless some fool nation goes to cutting up too much, in which case, with you as our intrepid leader, we will fram the tail feathers out of um with golf clubs, and if they won't fight that way then we will leave it to arbitration. This is, somewhat briefly expressed, our opinion of you as our next President. This is no time nor place to tell you how we feel towards you personally—blushes must be spared on both sides. Somewhere in the gloaming each man must attend to this for himself.

THE GEORGIA JUDICIARY.

“I am called upon to respond to the toast, ‘The Judiciary.’ As for recorders, ordinaries, justices of the peace, judges of the city and county courts, why, the less said the better. As for the judges of the Supreme Court and the Court of Appeals I am afraid to say anything about them, no matter what I might think. This leaves for consideration only my brethren of the superior courts. These courts are presided over by twenty-six judges, a few of whom are lawyers, but most of whom are good men. For my own part I don't care which class my friends put me in—I don't aspire to both.

“I want to be serious if it is possible to be so on such a happy occasion. Since 1777, the superior courts have been earnestly engaged in the divine labor of separating the good from the evil and their labor has not been in vain. A great sage believes the millenium will have come when ‘No man shall work for money.’ The Georgia judge has certainly been a millenium promoter. Hundreds of wise men have toiled on in this field for barely more than board, lodging and chewing tobacco.

“One of the hopeful things in human nature is its responsiveness to ennobling environment. Take a business man, make a soldier of him—put him in the forefront of battle and he becomes a hero; take a miserable, selfish

bachelor—he marries and as a husband becomes a martyr; a spoiled beauty weds and as a wife becomes a saint; a sorry lawyer is appointed a judge and as such does much better than you would think for—I know it—I mean I have observed it. A true sport doesn't shoot birds on the ground, or dynamite fish; he doesn't monkey with the discards, or tee his ball twice. So the average judge hands out a 'square deal' just as a matter of course—it doesn't strain him. The bench is such a good place to be good and do good that most judges make good. There is a lot of good in Georgia judges. Under our practice only a little of it can come out and the balance must be somewhere. Every time he gets off a real good thing the higher court has to cut in with a word they always print in italics—*reversed*. Under the common law, in the Federal courts and other jurisdictions the judge can spread himself, but under our 'dumb act' he is intellectually sterilized and has a tendency to shrivel up. In the trial of a case he must not 'express or intimate his opinion as to what has or has not been proved, or as to the guilt of the accused.' He can set up the dry white skeleton of the law for the jury, but the warm flesh and blood and vibrant nerves of the case he dare not touch. The jury box is holy ground. The judge cannot even take off his shoes and step in—no, if 'Seraphim, whose footfalls tinkled on the tufted floor,' should try it the higher court would holler out, 'Keep off the grass.' I am not complaining about this, just making observations. The chief judge remembers the case in which I tried to shed light on the facts, 'daylight for it had not all gone out of the sky.' Well, the chief judge took me across his knees—gently, but firmly, as a father might a son, and he did to me figuratively what a father does to a son under those circumstances. When he paused to take breath I told him I wouldn't do it any more, and I haven't. I know I have a Christian spirit for in spite of all this I feel kindly

towards the chief judge. In a jury trial I don't come in Marconi distance of the facts. As most of you know, gentlemen, I generally charge the jury on the German system of feeding cows and tell them to return a verdict that shall speak the truth.

WHAT A JUDGE MAY DO.

Seriously, gentlemen, there is a wide field of usefulness for the trial judge in Georgia. His path may be very straight and narrow in jury trials, but then you know where such paths lead. In many things his discretion is broad, and on the equity side of the court he is given the free hand. In the long ago there presided over the Augusta circuit a wise and amiable jurist, Judge Schley. Mr. Carson, an old country lawyer, rode on horseback in mid-summer from Montgomery County to Augusta to present a petition and prayer for equitable relief. Judge Schley carefully perused the long document and then sorrowfully returned it to the aged practitioner, saying: 'Sir, I can find no equity in your bill.'

"'Jedge, you say you can't find no ekity in the bill?'"

"'No, sir; I cannot.'

"'Why, jedge, I rid a hundred and thirty-two miles horseback to git you to sign that bill, and the sun was awful hot.'

"'A hundred and thirty-two miles, and the sun was awful hot? Hand me your bill, sir; I reckon I'll have to sign it.'

"You may be sure, however, that the order signed by the tender-hearted judge was very conservative and that when that 'ekity bill' came on to be heard it was determined in accordance with strict justice upon the law and the evidence, and so are determined the vast majority of cases in this good State."

THE FOREIGN JUDICIARY

Mr. Justice Riddell,

of the High Court of Justice for Ontario

“ Mr. Chairman, Your Honors and Gentlemen :

“ When I left my own beautiful city for a temporary sojourn in yours, which is no less beautiful and is situate in a clime which, at this season of the year at least, is more benign, nothing could be further from my thoughts than that I should have the privilege of addressing a body of gentlemen such as I now see before me and upon an occasion like the present.

“ It was not that I did not think—nay, know—that such gatherings must be everywhere that Anglo-Saxons were to be found. It is a well-known fact that if any number, however small, (being not less than three,) of men of our race meet, even though it should be on a desert isle, the first thing which is done is to hold a public meeting, at which would be chosen as chairman the gentleman who had the least knowledge of Cushing’s Manual; a municipality would be formed and a dinner would be given to celebrate the occasion. At that dinner there would, *ex necessitate rei*, be addresses more or less appropriate. So near to each other in the Anglo-Saxon soul are the twin arts of gastronomy and oratory.

“ And so, of course, I well knew that where’er I might go in this favored land there would be dinners of a public and celebrative character, and at those dinners there would certainly and in the very nature of things be public speaking. But, as I have said, I did not and could not think that I would be one of those selected for an after-dinner speech.

"It has come about in a very simple way. You all know that as an actor, when he gets a holiday, always spends it in a theatre, so a lawyer, if he chances to have an off day, always goes to some court. Personally conducted as I am upon the present trip, until to-day I had no chance to steal away to indulge in this delight; but to-day my guide, philosopher and friend was carried off to a bridge and a barbecue, leaving me without a keeper. Of course, I looked in the newspapers to see if there were a court which I might visit, and when I found that a court was sitting I at once proceeded to the court room. Unfortunately for me, Judge Speer had already risen, so that I had no opportunity for the forbidden pleasure.

"Now there is a solidarity, a brotherhood, which is characteristic of practitioners of the law—and perhaps more particularly those of the common law—which will not permit them to allow a brother to stand out in the cold if there is a good thing going, the brethren must have their share. And this characteristic is to be found as well in judges as in other members of the bar. You observe that I say 'other members of the Bar.' In my land, a barrister does not cease to be a member of the Bar upon accepting His Majesty's patent as a justice of one of His Majesty's courts: quite recently, the Lord Chancellor in England put forward a claim to be considered as still a member of the Bar, notwithstanding his high official and judicial position. And in my own province, at the last meeting of the Ontario Bar Association, a judicial brother of my own made the same claim. In each case the claim was allowed. It came then rather unexpectedly when in some of the remarks made by the very eminent and learned speakers who have preceded me, the line seemed to be drawn discriminating and differentiating Bench and Bar. Well, however that may be, my friend, Judge Speer—if he will allow me to call him my friend—when I gave myself the pleasure of introducing myself to

him, at once, knowing that I was a brother in the law, and that there was this good thing going, made it a point that I should have my share, so far as he could do so. And it needed only that your Vice Chairman, Judge Lamar, should be told that there was a wandering judge around to bring forthwith a warm southern invitation to join you this evening. The only fly in the ointment was that my friend coupled with the invitation to dine and listen, an invitation, which to a guest is equivalent to a command, that I should speak in response to a toast. Such was the chain of events which has led to my now being on my feet addressing you, and however I may succeed in the task laid upon me, I do now most heartily thank these eminent gentlemen and you for the very great kindness shown me in allowing me to be present at this interesting, and, it must be, historical occasion, to listen to the able and powerful addresses which have been made, and for the time being at least to be one of you.

“If I could complain of anything, it would be that the toast to which I am to respond is the ‘*foreign judiciary*.’ I may any day after the rising of my court in Toronto, take the train and in the morning enter a courtroom in which sits a judge who has received his patent and his mandate from the same King who gave me mine; but the law he administers is not my law, it is not the English common law, but the old Coutume de Paris based upon the civil law of Rome, though modified by statute. As his law is not my law, so his language is not my language, and I truly feel myself in a foreign court and in a foreign atmosphere. But if I take another direction, by the same time I may find myself in the State of Michigan or in the State of New York, and if I enter a courtroom, there will be a judge whose terminology will be as familiar as household words, his language will be mine, and I shall recognize the law laid down by him as my own and based upon the common law, the noble common law of England

which I am in the daily habit of calling to my aid in the decision of the rights of the litigants in my own court. I cannot call myself—I refuse to call myself—a ‘foreigner’ in any land in which my language is spoken, and in which my law governs. And in this State of Georgia, where your tongue is my own, and your law is the common law of England, clarified by the genius of a Cobb, I feel myself not the alien but the brother having the same grand heritage, and though under another flag, having the same rights and privileges.

“Now, leaving aside personalities, let me say that I bring you greetings from that young nation of the North, Our Lady of the Snows, who casting off from her beautiful limbs the swaddling bands which too long have checked and impeded her high career, and with eagle light in her eye, is pressing forward to place herself not unworthily by the side of her older and richer and greater brother.

“You citizens of the United States of America, you men of Georgia, loyally loving your Nation and your State, will understand me—patriots as you are—when I cry: ‘I am proud of my province and of my dominion and of the greater empire of which these form an integral part; I love my land with a patriot’s devotion.’

“It is not always remembered that when your forefathers, on that fateful fourth day of July, cast their defiance in the face of an unwise King, they were acting not for themselves alone, but for the whole race, if not, indeed, for all mankind. They, Englishmen on this side of the Atlantic, were saying to Englishmen on the other: ‘Englishmen will govern themselves.’

“And the echoes of that day and the assertion of rights on that day made have not died and cannot die. One lesson of that kind was sufficient, and the Dominion of Canada and the Dominion of New Zealand, the Commonwealth of Australia, the Colonies of South Africa and the

ancient Island of Newfoundland, self-governing communities, to-day reap the harvest that day sown, glorying in their freedom, but bound to their mighty motherland by that silken bond of loyalty and love which, lighter than air, but stronger than death, will, please God, never be broken.

“With us we have the same difficulties, the same problems as you, though perhaps in our younger land not quite to so great an extent or so acutely. We have the same troubles in respect of labor and capital, employer and employed; the same perplexing questions as to corporate wealth and corporate regulation; all these and more we have and are working them out in our own way, looking to the south to follow or avoid examples set by you, learning by your experience, as well as our own.

“And in the domain of law we have the same problems; in our courts there is the same difficulty, what witness or set of witnesses is to be believed, and, if only in part, in what part; what are actually the facts, and, the facts being established, how can justice be done in the particular case without doing violence to the general principle; in what cases shall there be an appeal and in what a second or a third appeal. All these and many like questions we are met with daily, and all of them we are solving as best we may in much the same way as you, our ‘separated brethren.’ In some respects, I may be permitted to say, we are in advance, in my humble opinion, of some, at least, of the States of the Union. For example, in all my twenty-six years’ experience I have never known it take more than half an hour to select a jury, even in a murder case. It is rare that even a murder case lasts more than a day or a day and a half. For example, the last murder case tried before myself took less than a day and a half, though there were ten expert witnesses examined, the defense of insanity having been set up. Last year I went to London, Ontario, to take the

assizes. We began the sittings upon the same day as they began the selection of a jury in a murder case in the neighboring city of Detroit, Michigan. We had finished our assizes, a fair amount of civil work had been done and four persons were comfortably on their way to the Kingston Penitentiary before the American court had obtained a jury.

“In civil matters we have rather an abundance of appeals. From the trial by judge or jury an appeal may be had to a Divisional Court, thence in some cases to the Court of Appeal for Ontario, thence in cases of sufficient importance to the Supreme Court of Canada or to the King’s Privy Council at Westminster. In some cases, indeed, the Privy Council has allowed an appeal to be taken from a decision of the Supreme Court of Canada, when the appeal in the first instance had been taken to the latter court rather than to the Privy Council immediately from the Court of Appeal. The Privy Council is the final court, the court of ultimate resort, for all parts of the British Empire except the British Isles. These look in the ordinary case to the House of Lords. I do not know that our Canadian courts differ much from your own, except, perhaps, that we retain the practice of a particular costume. Our judges wear black clothes, the King’s Counsel coat or jacket, black silk gown of King’s Counsel cut, white linen and white bands, also of linen. (It always strikes a Canadian with an odd sense of incongruity to see a judge on this side of the line with a silk gown and a *black* tie.) Our barristers are also in black, at least as low as the waist—we have a saying that a judge cannot see below the belt—with black stuff gown, if of the Outer Bar, and silk, if a King’s Counsel. In either case, white linen is *de rigueur*, and either bands or tie of white linen.

“But the Judicial Committee are not judges as such—they are a committee of His Majesty’s Privy Council of

great legal attainments and are generally such as have held high judicial position, including representatives from Canada, Australia and South Africa, as well as persons who have been judges in India. But there is no absolute necessity that a member of this committee shall have been a judge or even a barrister. Cases have been known in which one who could not claim the right to be heard as an advocate in any court in the Empire has sat upon this committee and took part in the determination of important questions.

“Not sitting as judges, they have no official garb; they sit in the well of a dingy old room in a dingy old building in Downing Street, dressed as ordinary English gentlemen. They are addressed, indeed, as ‘My Lords’ or ‘Your Lordships,’ but they are entitled to that as being members of His Majesty’s Privy Council. The barristers are robed and clothed as in an ordinary English court, and that is much the same as in our own, except that all wear bands and all wear wigs. It is really astonishing (*crede experto*) how soon one grows accustomed to wearing a wig; and I have no doubt that the English barrister has the same sense of incongruity upon seeing us with gown and bands but without wigs as we have upon seeing some of your judges with a gown but without bands or white tie.

“What strikes one most in this ultimate appellate body is the extraordinary variety of cases they are called upon to deal with. I recall the last time that I was before the committee (having a matter concerning an American Railway, for which I was counsel) being obliged to wait for some days. During that time I heard argued cases from British Columbia as to the power of the Province to pass certain legislation; from Ontario, as to the duty of municipalities in respect to private water-powers; from Newfoundland, as to the rights and wrongs of a collision between two ships; from the Supreme Court of Canada, as

to the right of the Parliament of Canada to pass legislation as to the observance of the Lord's day; and there was an appeal from Australia and one from New Zealand. All these I could follow and in a manner understand—as could any of you or any American lawyer. But there was an appeal from the Cape. Roman-Dutch law was chopped and thrown at the committee, law was cited in Latin, which would have made Cicero shiver, had he heard it, and that committee sat and took it all in like mother's milk. If they did not understand it all they were guilty of false pretences. And that was not the worst. An Indian appeal came on to be decided on the disputed fact who had the right to perform ancestral sacrifices to a deceased; and an appeal came from Hong Kong.

“There were many other places from which appeals might have come, the Channel Islands or Isle of Man or Malta, or from the West Indies, Jamaica or Bermudas or Bahamas or Trinidad, or from other parts of the East Indies, from Siam or Korea, and ancient Quebec did supply her quota. All kinds of law had to be considered, the common law of England, the French-Canadian law, the Roman-Dutch law, the customary law of India, Mohammedan or Hindu, the law of the road at sea—through the wilderness of indefinite law the committee must make its way and lay down paths that all thereafter must follow.

“And as I sat in that old room listening to the decision of questions of the most varied kind between man and man and between State and State, the thought came to me, as I doubt not it had come to many others, ‘Why cannot all questions between nation and nation be decided by such a body as well as questions between individuals or between dependencies of the same Empires? And it is in consequence of some such thought that I especially congratulate the United States of America upon the

election of your honored guest, Judge Taft, as President. I would not if I could, I could not if I would say one word in disparagement of the great American who bore the banner of the opposing host. William Jennings Bryan must be great as well as loveable or he could not call forth as he has the enthusiastic devotion of millions of Americans whose heads are hard if their hearts are warm. Nor is there aught in his past to prove that he would not have made a great President. In the old land a man remains pretty much in the condition of life in which he is born and as he begins life he is expected to end it—the farm laborer must not expect to become a farmer and the clerk who sells tape may not aspire to a hardware shop. But upon this continent every position is open to him who deserves it. We do not break our ‘birth’s invidious bar’ only because such bar does not exist, and there is no reason why the editor should not become the skilled and skillful diplomatist; the versatility of the American is proverbial and William Jennings Bryan might have been the greatest success from every point of view.

“It will not do, either, for us lawyers to arrogate to ourselves exclusively all the cardinal virtues or even such of them as are brought into play in the sphere of politics and statesmanship. It is true that most of the Presidents of the United States as most of the Premiers of the Dominion of Canada have been lawyers, but the land surveyor of Virginia was George Washington, and the College professor of Ohio, James Garfield; and so the practising physician Sir Charles Tupper and the stone mason who worked with his own hands, Alexander McKenzie, became Premiers of the Dominion. But had Mr. Bryan become President the future of his administration would have lain on the knees of the Gods—he has not been tried.

"But from the past of my brother Taft (and I am much gratified that for once at least I can speak of a President elect of the United States as 'my brother,') the future may fairly be inferred. I do not think he was born in Missouri; but it is certain that early in life he met that man from Missouri who says 'You have got to show me.' He has all his life been 'showing.' Indeed before he began life at all he showed the acumen which has ever since characterized him, selecting as he did such a father and such a grandfather. Sent to school, William Howard Taft made good; later, becoming a son of Old Eli, William Howard Taft made good; appointed a District Attorney, Mr. Attorney Taft made good; becoming a judge, Judge Taft made good; and Secretary made good; giving the greatest opportunity which I verily believe has been vouchsafed to any living man, sent as more than Proconsul to the Phillipines, to rule over and fix the destiny of seven millions of human souls and their children and children's children for numberless generations (and I much mistake if it was not the opportunity for usefulness more than the very great honor which Governor Taft valued) again he made good; and again as Secretary and as the peacemaker in Cuba my brother made good. From the past we judge the future; and we and the world expect great things of Mr. Taft—we expect him to make good.

"There is no man in the whole earth whose influence in compelling peace can compare with that of the President of the United States. My own beloved sovereign who of all his titles treasures most the unofficial one, 'Edward the Peacemaker,' no doubt has much influence and constantly exercises that influence; the Emperor of Germany has much, and the Czar of Russia a little. The other monarchs may almost be disregarded. None of these can for a moment be considered to compare in influence in regard of peace with the head of this nation, which, if it demands peace cannot be suspected of selfish motives,

since if it declares war, it does not avail itself of the spoils of war. Cuba is an object lesson for the world; and the power which effected the peace of Portsmouth can now never again be allowed to become effete from lack of use.

"It would be the sheerest impertinence in me to presume to advise or recommend any course for the coming President, or for the United States: the United States frames its policy without regard to the wishes or desire of any nation or people, and solely in the interest of the United States—and such course is wholly right. No one other than a citizen of the United States has any right even to hint at the course the United States shall pursue; but if it ever be that the United States has a navy commensurate with its standing among the nations of the earth, I think I can with a prophetic eye, the eye of faith, see two mighty fleets sail forth, side by side, the one under the flag that braved a thousand years the battle and the breeze, the other under a newer but no less glorious flag, and now known in every sea: and the mandate will go forth "There shall be no more War"—and there shall be no more war.

"When a few short years ago it became known that your great nation was coming out and taking its part in world politics, a feeling of relief and joy was experienced by all who truly love peace: it became evident that what is not so much the white man's burden as the Anglo-Saxon's durden was to be taken up by a new Titan who could have no selfish ends to serve, having no need of foreign conquest and invincible at home. And Asia knows on more than one field that beneficent interference, which once would not have been forthcoming from this nation: next year or the next or the next it may be felt in Africa or even on the world's weary plains of Europe; in any case it can never again be that the affairs of the nations can be settled without regards to the wishes of the United States.

“And who so competent to guide the destinies of the nation and of the world as the man of legal instincts, of judicial temperament and calm judgment, who has been tried and not found wanting?”

“The relations between the two great branches of the Anglo-Saxon race have in the past been more than once strained; misunderstandings will arise, unwise persons will say injudicious words and do injudicious acts; but each branch knows that the great heart of the other is sound, and peace is assured if the questions between the two nations are fully understood, the grounds upon which the several claims are advanced are made clear—which follows almost as a necessary consequence—the matters are approached and discussed with calmness and candor. This is what my branch of the Anglo-Saxon world expects from Mr. Taft; and there is no one thing that will make for universal peace more than the absolute certainty, so far as anything terrestrial can be absolutely certain, that the Anglo-Saxon world must be at peace.

“I must apologize for even hinting at much that may be expected: my only excuse is the tremendous importance to my own dear land, even more than to the rest of the Empire of which I am a subject, of the course taken by this mighty nation: the smaller body by the side of the larger, and close beside, is in the nature of things bound to be greatly influenced by that greater: and we in Canada look as naturally with interest to see what is done in Washington as what is done in Ottawa or in London.

“I thank you again for the very great pleasure and the privilege you have given by permitting me to be present upon the present occasion, and of joining you in doing honor to the guest of the evening—and I cannot resume my seat without wishing him and you and the people of this mighty nation, bone of my bone and flesh of my flesh as you and he are, a reverent and hearty God speed.”

The banquet continued until a late hour and was in every respect a complete success. The meeting adjourned to convene at the court house at 11 o'clock, January 12, where the regular annual session of the Augusta Bar Association was held, at which time an address was to be delivered by Hon. Andrew J. Cobb, ex-justice of the Supreme Court of Georgia. Judge Taft was again a guest of the Association and was elected an honorary member thereof, by invitation, taking his seat on the bench in the Superior Court room with Major Black, who presided.

Justice Cobb is greatly admired by the Bar of Augusta, as by that of the whole State, and the Association was deeply interested in his valuable paper, which was as follows:

A Brief History of "TRIAL BY JURY" in Georgia, with Some Reflections on the Jury System and Other Matters.

"Mr. President and Gentlemen of the Augusta Bar Association:

"I esteem it a high privilege to appear before this Association.

"The Augusta Bar has a history beginning in the early days of the colony. The biographies of its members would constitute a history of Georgia and embrace many of the important events in the history of the Union. In nearly every important event in the public history of the State, members of this Bar have been actors.

"From the first session of the Continental Congress to the assembling of the legislature of the State, charged with the duty of carrying into effect its latest constitution, in every assembly, both State and Federal, upon which was imposed the duty of promulgating or carrying into effect a State document of epoch-making character, the Augusta Bar has furnished a member.

“The Declaration of Independence, the Constitution of the United States, the different constitutions of this State, the Ordinance of Secession, all bear the signature of a member of the Augusta Bar.

“It has furnished governors and legislators to the State, Senators and Representatives to the Congress of the United States and Senators and Representatives to the Southern Confederacy. It has furnished Cabinet officers to the Union, judges and law officers to this State, other States and the United States.

“More than this, it has furnished those who were so wedded to the duties and responsibilities of the profession that they could not be drawn away by the allurements of public office, whose lives and characters are and will be a stimulus to all who desire to make their walk through life honorable and useful.

“The Augusta Bar stands to day for all that is highest and best in the profession and is constantly seeking those high ideals that were contended for by its members in the past.

“I repeat it, I esteem it a high privilege to be permitted to appear before a bar with such a present and such a past, and count myself fortunate that I may be thus connected with its traditions and its endeavors.

“The title of the paper that I will read before you has been thus framed :

“‘A brief history of trial by jury in Georgia, with some reflections on the Jury System and other matters.’

“The wise legislator of this State never fails to add to the title of his bill the words, ‘and for other purposes,’ and in this way often saves some provision of the bill which might be inoperative if these words were absent. The purpose of these words is to warn the legislative body not to be surprised if a reading of the bill discloses matters not exactly embraced in the language of the title.

"The example of the wise legislator has been followed on the present occasion, and by the use of the words 'and other matters' I give warning that things may be said that are not embraced within the restricted terms of the title which has been announced.

"I have to this extent submitted to the rule that nothing shall appear that is not indicated in the title, but I will, without hesitation or compunction of conscience, violate the kindred rule that forbids the introduction of two subjects-matter.

"I will make digressions, but in doing so I will justify myself by respectable precedent.

"Chief Justice Lumpkin was given to this fault, or virtue, however it may be classified.

"In the case of 'The Commissioners vs. The Griffin, etc., Plank Road Co., 9 Ga. 487,' the sole question for decision was whether an appeal entered by an attorney at law without authority from the appellant was valid. In the opinion Chief Justice Lumpkin devotes a half page to a discussion of this question and more than a page to some 'general observations upon the subject of plank roads.

"This tendency of the learned jurist was well known to his contemporaries and is referred to in one of the 'Billy Woodpile Letters' in a sentence something like this:

"'But to return, as Chief Justice Lumpkin once remarked in the course of an opinion in a rape case, after a lengthy digression on the subject of infant baptism.'

"In 1848, Judge Nisbet said: 'The right of trial by jury would have been as perfect in the States of this Union, which were British Colonies, without a constitutional declaration of that right, as it is now with it. Yet it may be added, not so secure. The right came with the colonists. It was derived from Magna Charta.'

"Tift vs. Griffin, 5 Ga. 188.

“It is not my purpose to trace the history of trial by jury, but to deal with it as it existed in England when the Colony of Georgia was settled. At this time trial by jury was had in England in all cases at law in the superior courts, but certain inferior courts were vested with authority to hear and determine personal actions without a jury when the amount in controversy did not exceed forty shillings. These inferior courts bore different names, such as county courts, courts baron, courts of conscience, etc., but the right of the judge in each to try a case without a jury was limited, as just indicated. *Capital Traction Co. vs. Hof.*, 174 U. S. 16. Colonial legislation in Georgia extended the right of trial by jury to all cases at law.

“In 1760 an act was passed creating a court of conscience with jurisdiction in civil cases involving small amounts, and trial by jury was provided in all cases. This court was continued in existence by the Constitution of 1777, but its jurisdiction was by that instrument limited to cases involving not exceeding ten pounds. It was finally abolished in 1789.

“There also existed in the colony a court known as the Court Merchant, which was recognized by the Constitution of 1777, and continued in existence by the Constitution of 1789. This court seems to have been instituted for the trial of controversies of merchants, dealers and others with shipmasters, super-cargoes and other transient persons. The court was held by the Chief Justice, or in his absence by one of the justices of the General Court of Pleas, and its proceedings were summary, cases being tried at any time on seven days notice, but all cases were tried by a jury of merchants or other fit persons.

“There was no court in the colony of Georgia having jurisdiction to try cases at law in which a jury was not provided in all such cases.

“‘Trial by jury to remain inviolate forever’ was the

declaration of the first Constitution of Georgia, adopted in 1777.

“The Constitution of 1789 provided: ‘Trial by jury shall remain inviolate.’

“The language of the Constitution of 1798 was: ‘Trial by jury as heretofore used in this State shall remain inviolate.’

“Watkins Digest, 16, 29, 41.

“This Constitution continued in force until 1861.

“In 1789 the entire judiciary system of the State was revised. The courts embraced in the system provided by this act were the Superior Court and the Inferior County Court, commonly called the Inferior Court. In the Superior Court a trial by jury was had in the first instance, and in the Inferior Court either in the first instance or on an appeal.

“In 1797 the judiciary system was again revised, the Inferior Court was given concurrent jurisdiction with the Superior Court in all civil cases except those involving real estate, appeals were allowed from the Inferior to the Superior Court, and Justices of the Peace were given jurisdiction in all suits for debts where the sum claimed did not exceed thirty dollars. All cases tried before a Justice of the Peace were subject to be appealed to a jury in that court consisting of five jurors, and it was provided that the verdict of the jury on the appeal should be ‘final and conclusive.’

“This latter provision did not meet with universal approval, as will appear from the following extract from the general presentments of the first grand jury of Clarke County in 1802.

“We also present Micajah Bengé, Esquire, for profane swearing on the 11th day of September, 1802, at Capt. Wortham’s, on Esquire McAlpin’s court day, and also for profanely cursing the juries of the said Justice Court; also for bidding his Maker dam the Legislature for pass-

ing a law that the verdict of any damned fool jury of a Justice Court should be final and conclusive, and also for wishing God to dam the world, and also for abusing a professor of religion, one of the aforesaid abused jury. We also present it a grievance that said Micajah Benge, or any such characters should be in the commission of the peace.'

"Micajah Benge, Esq., was a Justice of the Peace with some knowledge of the rules of special pleading, for his denunciation of the act in question was in manner and form as the law was enacted. The attack upon the law followed the exact language of the statute. There could be no doubt about the identity of the statute which was involved in his oral altercation with the law making power.

"In our amusement at this quaint finding of the grand inquest of more than a century ago, let us not lose sight of the worthy and admirable spirit and sentiment which brought it about. Respect for the law, the lawmaker and the courts, and reverence for religion was the lesson which these grand jurors of Georgia, of the early days of the nineteenth century sought to impress upon the people of their time.

"Is this spirit sufficiently active to-day? Would it not be well that we take care lest this spirit entirely depart from us.

"At the March Term, 1804, Micajah Benge, Esq., was arraigned, and having withdrawn his plea of not guilty, formerly entered, pleaded guilty, and the record recites that 'The court having heard M. Benge, by counsel, in exculpation, fined him five dollars, and ordered him discharged on the payment of said fine and costs.'

"The record closes with an entry by the clerk, 'Fine paid, \$5.00, by M. Benge.'

"It is proper to note that in 1811 the General Assembly provided that the verdict of the jury in the Justices

Court could be reviewed by the Superior Court on certiorari. Cobb's Digest, 646.

"The sentiment so profanely expressed by Micajah Bengé, Esq., in 1802 finally triumphed.

"The following appears in the presentments of the grand jury of Clarke County in 1803:

" 'We also present Robert Fulwood for swearing and saying in the presence of Alexander Dunn, Samuel Braswell, John Heard and William Wortham, that if he had people to back him that he would be the first man that would lay hold of the judge after the court broke, and put him in the stocks.'

"Hon. John Griffin was the judge in question. This incident is alluded to merely to direct attention to the fact that neither judges nor juries at that period in the history of the county seemed to be giving entire satisfaction.

"When the Constitution of 1798 was adopted, a trial by jury was allowed at some stage of the case in all common law cases in all courts. It was authorized either in the first instance or on appeal, though an appeal was in some cases conditioned on the payment of costs and the giving of bond. The Judiciary Act of 1799 made no changes which affected the right of a jury trial in all cases at law. Cobb's Digest, 1135.

"The common-law courts of that day were the Superior, Inferior and Justices' Courts. It was later found that this system did not meet the necessities of certain localities, and local courts were provided in different places.

"In 1816 the Mayor's Court of Darien was given jurisdiction in civil cases where the amount did not exceed fifty dollars.

"In 1817 the Mayor's Court of Augusta was given jurisdiction in all civil cases where the constitution did not vest exclusive jurisdiction in other courts.

"In 1819 a Court of Common Pleas was established in Savannah, with jurisdiction in civil cases where the amount claimed was more than thirty dollars and did not exceed two hundred dollars. Trial by jury and a jury of twelve men was provided in all these cases.

"Mr. Prince, in his Digest of 1822, (p. 233,) refers to these three courts as 'City Courts' and groups them in a class by that name. This is the first time that the term 'City Court' as descriptive of a local court appears in any compilation of the laws of Georgia, and there can be little doubt that this name, as the designation of local courts of this character, originated with Mr. Prince. He adheres to the same term in his Digest of 1837. Prince's Digest, pp. 481-491-498.

"Mr. Cobb adopts the term in his Digest of 1851. Cobb's Digest, pp. 602, 617, 634. The term 'City Court' first appears in the legislation of this State in 1853, when the name of the local court at Savannah was changed to the 'City Court of Savannah.' Acts 1853-4, p. 281.

"In 1826 the name of the local court at Augusta was changed to the Court of Common Pleas for the City of Augusta, (Cobb's Digest, 608,) and in 1856 the name was changed to the City Court of Augusta, (Acts 1855-6, p. 276,) and the term City Court for the second time appears in the legislation of the State. No other local courts having jurisdiction in civil cases were established prior to the adoption of the Code in 1863.

"It is interesting to note that the establishment of the three courts above referred to was the beginning of legislation to meet by local laws the inadequacy of the judiciary system as finally adopted by the acts of 1797 and 1799.

"There are now in existence more than seventy local courts denominated City Courts, and the total number that have been in existence would be more than one hundred.

“The policy of the general assembly has been to create them as the necessity required and to abolish them when no longer needed.

“Since 1863 we have had County Courts, District Courts and courts by other names, but with a single exception the law has always provided that in common-law cases in all courts, of whatever name, the parties shall be entitled to a trial by jury either in the first instance or on an appeal; and this is true as to the time when the Constitutions of 1861 and 1865 were of force, when there was no express inhibition upon the general assembly preventing it from depriving a person of a trial by jury in civil cases.

“The Constitution of 1868 authorized a justice of the peace to render judgments in cases where not more than fifty dollars was involved, and no appeal to a jury was allowed, but the judgment could be reviewed by the Superior Court on certiorari. This is the only instance in the history of the State or the colony where a party was deprived of a jury trial in a common-law case. The Constitution of 1877 restored the right of trial by jury in these cases.

“The County Court Act of 1872 deprived parties of a jury trial in cases where the sum claimed did not exceed fifty dollars, but this portion of the act has been recently declared unconstitutional. *Delamar vs. Dollar*, 128 Ga. 57.

“The Judiciary Act of 1799 declared: ‘The Superior Courts in the several counties shall exercise the powers of a court of equity in all cases where a common-law remedy is not adequate.’ *Cobb’s Digest*, 467.

“It was at one time a question whether a jury was at all necessary in an equity case. The contention of some was that the act of 1799 having conferred chancery power upon the Superior Court, it clothed the judge with all the power of the chancellor in England.

"This question was put at rest in 1847 by the decision in the case of *Hargraves vs. Lewis*, 3 Ga. 168, where Judge Lumpkin says 'that the usage of the Superior Courts for a long series of years has been to submit the facts in all trials in equity to a jury, and that this usage has been sanctioned by repeated acts of the legislature recognizing it,' and that he has 'no doubt but that it had its origin in quite sufficient authority of law;' and concludes with the statement that 'in Georgia the judge and the jury constitute the chancellor.'

"In *Mounce vs. Byars*, 11 Ga. 180 (1852), this last remark was explained by Judge Nisbet to mean that the judge was the chancellor as to the law and the jury the chancellor as to the facts, and that the judge could dismiss a bill at the final hearing for the want of evidence or other sufficient legal reason. The contention in that case was that every equity case must be submitted to a jury, and no such case could be disposed of without the concurrent action of both judge and jury.

This contention appears strange and peculiar. However, in *Merry vs. Wilds*, 100 Ga. 426 (1897), it was held that an appeal case in a Justice's Court could not be dismissed by the justice for a defeat in the pleadings until after a jury was empannelled; that in such a case the jury was a necessary component part of the court, and in their absence the justice was without jurisdiction. It was not held that the jury should participate in the dismissal, but they must be present, at least as witnesses to the transaction.

"In *Cardin vs. Jones*, 23 Ga. 175 (1857), it was held that the jury was not a necessary part of the court in an equity case, so far as interlocutory orders were concerned, even though in the passing of such orders issues of fact were involved. The effect of this decision is that the jury is only necessary at the final hearing when a final decree is to be entered.

"It was also at one time a question as to whether trial by jury in an equity was in this State a constitutional right. The contention was that trial by jury in such cases was allowed prior to 1798, and that as the Constitution of that date declared that 'trial by jury as heretofore used in this State shall remain inviolate,' that such a trial in an equity case was a constitutional right. But in *Mahan vs. Cavendar*, 77 Ga. 118 (1886), it was held that the interposition of juries in the trial of equity cases was in this State purely a matter of legislative regulation, and had its origin in the Judiciary Act 1799.

"This decision, although by a divided court, was subsequently followed in a decision concurred in by all the justices, and has been since steadfastly adhered to.

"*Lamar vs. Allen*, 108 Ga. 162.

"Under the Code all equity cases which have not been referred to an auditor or master must be submitted to a jury if any issues of fact are involved. Civil Code, 4847. When a case has been so referred, exceptions of fact filed to the report need not be referred to a jury unless the judge approves the same. Civil Code, 4595.

"Issues of fact arising on motions for interlocutory orders which are purely interlocutory may be decided by the judge without a jury, but if the order is interlocutory merely as to time and final as to effect and merely anticipated the final hearing, a jury must decide all issues of fact if the case has not been referred.

"Civil Code, 4847.

"It will thus be seen that Georgia has not only preserved trial by jury in all cases at law where such a trial was allowed in England, but has extended it to cases in which it was not there allowed, requiring a jury in those cases which the petty tribunals in England could decide without a jury.

"Trial by jury has been engrafted on the chancery system of the State, so far as the final hearing is concerned.

“More than this the jury has been introduced as the arbiter of issues of fact in certain cases of indirect or constructive contempt.

“Whenever it appears that a person has been injured by the official misconduct of a sheriff, constable or other similar officer by a false return, a failure or refusal to enforce a process in his hands, or to pay over money collected or the like, the party aggrieved may apply for an attachment for contempt. Civil Code 4770-4782.

“Attorneys at law and justices of the peace are liable to be attached for contempt for a failure or refusal to pay over money collected by virtue of their office. Civil Code 4616-4782-4060.

“In all these cases it is provided that if the answer of the officer is traversed, the issue of fact thus raised shall be tried by a jury. Civil Code 4775. This provision of the law had its origin in the act of 1840, Cobb's Digest, 579.

“In *Craig vs. Maltbie*, 1 Ga. 544 (1846), an application for an attachment against a sheriff for allowing a debtor held on final process to escape, the trial judge, Hon. Charles Dougherty, refused to allow the applicant to traverse the answer of the sheriff; holding that the remedy of the applicant was by an action on the case and not by rule for contempt. The judgment was reversed upon the ground that under the act of 1840 the applicant had the right to traverse the answer, and there is in the opinion of Judge Nisbet a very strong intimation that if the act had not provided for a trial by jury it might have been invalid.

“The contention in this case was the Act of 1840 impaired the right of trial by jury, for in the absence of the statute the only remedy was an action in the case, and under the existing law an appeal to a second jury was allowed in cases of this character, while under the Act of 1840 there was no such appeal.

"In 1892 an act was passed which provided that in no case shall any person be imprisoned for contempt for failure to pay over money under an order of any court, when he denies that the money ordered to be paid over is in his power, custody or control, until he has had a trial by jury in the manner provided in the act. Civil Code 4046, Acts 1892, page 65.

"What is the right of trial by jury that the people of Georgia have so steadfastly adhered to, so broadly extended, and so strongly safeguarded?

"Is it the right to have questions of fact decided by ignorant and irresponsible men?

"Not by any means—but it is unquestionably the right to have such questions determined by men unlearned in the law. The jurors are not to be ignorant, but they are to be 'good and true men,' to use the vernacular of the past, and they must be 'intelligent and upright' to use the language of the law to-day. Civil Code 5877.

"No other qualification is required under the law than intelligence and probity. One who possesses these qualities is a competent juror under the law, even though he be unlearned and even illiterate.

"While trial by jury has at all times in this country and for many centuries in England been regarded by the majority as a right that cannot safely be dispensed with or impaired, there has been in its entire history a minority who discredited the system.

"So strong has been the adherence to the system in this country that in one instance, and probably in others, the establishment of the system has been made a condition precedent to the admission of a State into the Union.

"Those who decry the system contend for a tribunal composed of members learned in the law to whom shall be submitted all questions of law and fact.

"In the decision of question of law learning is required.

The law is a science, not an exact science—far from it—but nevertheless a science.

“Questions arising in any department of systematized knowledge must and can only be correctly solved by those who by investigation and thought have acquainted themselves with the principles which are at the foundation of the particular science and the rules which are evolved from these principles. It requires an expert to decide questions of science.

“A judge should be an expert. An expert from the necessity of the case is always within limits which are, relatively speaking, narrow and contracted. He is bounded by the limitation of his department of knowledge, and these are generally sharply defined.

“When the expert broadens his range of vision he ceases to be an expert. In the selection of judges only those who are experts in the department of knowledge, commonly called the law, should be considered.

“Jurors are not expected to be experts in any sense. The moment a juror becomes an expert in the decision of questions of fact and attempts to determine all such questions by fixed and unbending rules the advantages of the jury system cease to exist.

“There is not, and of necessity cannot be, a department of knowledge or a science denominating the facts.

“The investigation of years and the learning of centuries has been unable to formulate a code of rules to be implicitly followed and adhered to without variation, prescribing the manner in which issues of fact are to be solved. The judge, the expert in the law, in his instruction is able only to call attention to the so-called rules to be followed by the jury, which are at best merely suggestive.

“The formula which always follows the enunciation of these so-called rules, ‘However, gentlemen of the jury, all

these matters are for your exclusive consideration,' is the constantly repeated confession of learning that the method of determining issues of fact cannot be reduced to a science and made the subject of prescribed rules to be followed with confidence that the right result will be reached.

"The credibility of witnesses cannot be fixed by any set of definite rules. Interest, environments, manner, tone of voice, reasonableness of statement, and various other matters are to be generally taken into consideration.

"Those who are drawn from the same or similar sphere of activity as the witness comes from are by far safer judges of the veracity of a witness than one removed from that sphere.

"Merchants, bankers, brokers, farmers, laborers and others who make up the active and restless world of business, with their intimate knowledge of its affairs and the way in which man deals with man in the ordinary transactions of life, and having an acquaintance with the varying phases of human nature as it appears in such transactions, can be better trusted to determine the reliability of a witness than one situated as a judge withdrawn from the realm of business and trade.

"But, it may be said, is not a judge a lawyer—a trained thinker? He should be, and generally is, but his training and his thought are ever along the line of rules and reasons. He is expected to give a reason, and a satisfactory reason, for all that he does, and sometimes his training constrains him to do that which his own consciousness rebels against, from the fact that his ingenuity finds itself incapable of creating a reason for his doing otherwise. His limitations as an expert compel him to keep within the defined rules of his science.

"Not so with the jury. No reasons are expected from them. They are withdrawn for a time from the mass of humanity, of which they are a part: they perform their duties as jurors, are discharged from service and are again lost

in the throng from which they were temporarily separated. There is no human authority that can compel them to disclose their mental processes. The guides for a jury are honesty, intelligence, intuition, observation and experience. Wherever these lead they may go, with no fear of being called to account for their findings or being required to support them by the artificial rules of logic or in any other way. Truth is their goal, and in reaching it they are subjected to few restraints.

"A judge is a lawyer, but a lawyer in captivity. He is daily conscious of the bounds of his prison. He may have the inclination of the lawyer to take broad and expanding views, but he is shackled by precedent and his expressions must be toned to fit the conception of the judicial office. A lawyer is an expert, but his limits are broader than those of the judge.

"The eagle in captivity will always take his position at the highest point that his place of confinement will permit.

"So with the lawyer on the Bench, but he ever realizes that he is within bounds. Joseph Henry Lumpkin, the first Chief Justice of Georgia, at the Bar was a practitioner of skill and ability and an advocate of marvelous power. Tradition tells us of his flights of eloquence, accentuated by his aptness of illustration, rendered possible by the breadth of his learning.

"In his opinion as a judge you catch glimpses, but glimpses only, of the power of advocacy for which he was famous, and that we see no more of it in his judicial utterances only evidences that the advocate of broad range and power at the Bar becomes conscious when upon the Bench that he is in a place where he is curbed and restrained.

"General Henry R. Jackson, who as a young man had the privilege of seeing Chief Justice Lumpkin in the exercise of his power as an advocate and afterwards of ob-

serving him as a judge, said that the Chief Justice on the Bench always brought to his mind the idea of a caged bird.

"In *Robinson vs. Lane*, 19 Ga. 393, Judge Benning, in a dissenting opinion, uses these words: 'There is but one question for court—What is the law?'

"These are the words of the manacled lawyer who recognizes his inability to do that which his impulses and consciousness unrestrained might compel him to do. They are an admission of captivity, but in them there is no protest against the confinement. Beneath the words there rests the admission that that which is called the law, is not always in accord with natural justice. The rule which Judge Benning followed in the case in which his remark occurs was one that was venerable with age but harsh in effect. The other judges saw their way clear to hold that it was no longer of force.

"In *Heard vs. Sill*, 26 Ga. 309, Chief Justice Lumpkin makes this utterance: 'After all, where lies the justice of the case? I try always to dig deep for that; and when found, nothing but the most imperious legal necessity can restrain me from administering it.'

"There is nothing in these words incompatible with the judicial office, but we think we can hear in them the subdued voice of the lawyer protesting against the limitations of the bench.

"There is in them a sound of the wings of the eagle beating against the roof of his prison house.

"Erskine, as an advocate, was almost without a parallel. Curbed by the restraining influences of the bench, as chancellor, he added little to his reputation as a lawyer.

"He lives in history as Erskine the lawyer. There is nothing in his judicial career to take him out of the list of averages judges who perform their judicial duties with credit. His argument as a lawyer in Hadfield's case has

been cited as authority by judges, but his opinions as Chancellor are seldom referred to.

"The opinions of Lord Erskine, as chancellor, are reported by Vesey, Jr., and in one of the volumes of these reports we find in the index the following cross reference: 'Lunatic—See Lord Chancellor.' It was said, however, that this was due not to the malice but the simplicity of the reporter.

"In one of Lord Erskine's opinions appears the sentence: 'Lord Coke considers the word *lunaticus* as by no means material, only classing it with *amens*, *demens*, etc., and there is no doubt that the moon has no influence on lunatics.'

"The reporter treats the latter portion of this sentence as laying down a proposition of law and makes it the subject of a marginal note in the following words: 'In cases of lunacy, the notion that the moon has an influence is erroneous.'

"Ex Parte Craumer, 12 Vesey, Jr., 445-451; 6 Campbell Lives of Chancellors. (Edition 1848), page 435.

"Lord Coke, as a judge, not only rested cheerfully under the limitations of the strict rules of the common law, but combatted with all the force of his vigorous nature the effort to free the unfortunate litigant in his court by the interposition of the authority of the Court of Chancery with its less stringent rules, and deeper insight into the principles of natural justice.

"Lord Mansfield, although conscious of the limitations by which he was confined as a common law judge, had the temerity to break away from these bounds and called down upon himself the criticism that he was disloyal to the customs of the realm and destroying the integrity of the common law courts.

"Judges are more apt to lose their common sense than jurors, and even lawyers. I once heard one of the older lawyers of Georgia ask this question: 'Why is it that as

soon as a lawyer obtains a commission as a judge and takes his seat upon the bench he loses all the common sense he ever had?’

“ I do not admit that under such circumstances the lawyer loses all his common sense, but it is true that it is liable to be appreciably diminished. The judge is, from necessity and with the utmost propriety, largely withdrawn from contact and association with the business world, where common sense in its highest and best form generally prevails, and his life is in an atmosphere where he is in closer touch with that which is special and peculiar than that which is general. In the language of Chief Justice Warner, ‘ *He takes the veil.*’

“ The lawyer is a part of the business world, in close touch with it at all points, and while a specialist, his environment has the effect of restraining him from extending artificially the limitations of the science to which he owes allegiance.

“ I do not deem it altogether foreign to the subject under consideration to insert at this point the remarks of Judge John W. H. Underwood to three young men who were admitted to the Bar after an examination before him at Rome, Ga., in July, 1875. Sitting on the Bench with his hat on, as was his usual custom, his legs crossed, shaking his right foot, he said :

“ ‘ Now, young gentlemen, I want to say a thing or two to you. You have passed a better examination than most young men who are admitted to the Bar. Like those young fellows just back from graduation at college, you think you know a great deal. It is a great mistake; you don’t know anything. If you are ever of any account, you will be surprised at your present ignorance. Don’t be too big for your breeches. Go ’round to the justices’ courts and try to learn something. Don’t be afraid; let off on a high key. You will speak a great deal of nonsense, but you will have one consolation, but few will

know it. The great mass of mankind take sound for sense. Never mind about the character of your case; pitch in, you will be as apt to gain as to lose. Don't be alarmed at the wise-looking justice. He don't know a thing. He's a dead beat on knowledge. Stand to the rack, fodder or no fodder, and you will see daylight after a while. The community generally suppose that you will be rascals. There is no absolute necessity that you should be. You may be smart without being tricky. All lawyers ought to be gentlemen; most of them come up to the standard; a few are a disgrace to the fraternity. They know more, generally, than any other class, but not much in particular. They know but little of sand-stones, carboniferous periods and ancient land animals known as fossils. Many men pretend to know a great deal on these subjects; they know but little; they are superb humbugs, fossils themselves. Stick to your profession, study hard, work hard, be honest, do your duty and collect your fees. You are dismissed with the sincere hope of the court that you will escape a calamity that befalls many lawyers and not make asses of yourselves.'

"The Bar stands between the world and the Bench, the connecting link between the two, akin to both, having something in common with each, and the Bench reaches its highest point when it reflects both the learning and the common sense of the bar.

"There have been judges who have encountered as obstacles those things which the common sense of the world would brush aside without hesitation, and the lawyer would overcome with little difficulty.

"Even so small a thing as a punctuation point in a statute has been known to throw judges into a state of alarm and dismay almost amounting to a spasm. The dilemma presented of having to displace a comma or allow it to remain and defeat reason and justice would disturb the rest and try the soul.

"The semi-colon would present an impassable barrier, and the mere thought of disregarding a colon or a long dash would bring to mind the pains and penalties of a *praemunire*, if not of treason.

"And all this, too, notwithstanding that it is a matter of common knowledge that the punctuation of statutes is generally and almost universally the work of the public printer.

"The public printer of this State has no legislative power was the solemn declaration of the Supreme Court of Georgia in 1887.

"*Epstin vs. Levenson*, 79 Ga. 718.

"'Punctuation is no part of the statute,' said Justice Harlan in 1881 in *Hammock vs. Farmers Loan & Trust Co.*, U. S. 77, 26 L. Ed. 1113.

"If the judges of the future can only receive this saying, how much anxiety of thought and distress of soul will be avoided.

"For the benefit of those who may be skeptical as to the soundness of the rule laid down by Mr. Justice Harlan, it is well to call attention to another fact of common knowledge. Law-making bodies are and have been always made up of two classes, one broad minded and intelligent and so constituted as not to be thrown into a convulsion over the presence or absence of a comma, and the other of more limited range of information who are not acquainted with commas even by reputation.

"The compiler of the first Civil Code of Georgia used in all his writings only two punctuation points, the dash and the period.

"You will find in his Code the usual punctuation points but they were not placed there by him, but probably by the public printer or possibly by some reviser whose mind was more occupied with the 'mint, anise and cummin' than with the weightier matters of the law.

"Jurors are withdrawn from the realm of common

sense only during the limited period of their service, and they carry into their service all their common sense in its most active and acute form. The period of service is not of sufficient duration to bring about a change in their methods of thought nor free them from the influence which control them in determining the questions which arise in their daily life.

"Jury service must not be a business or calling, and the laws of this State are now so framed as to eliminate from the service so far as possible the juror who is tempted to make this service his avocation.

"When a juror becomes an expert he should be eliminated from the jury list.

"But it is said that juries sometimes make terrible mistakes. This must be conceded. The mistake of jurors are at times grievous. Judges also commit errors and make blunders that are great.

"Justice Gantt, of the Supreme Court of Missouri, in an address before the Virginia Bar Association in 1902, said: 'Whatever criticisms have been indulged in the past on the failure of juries to reach exact justice, it is at least true that their recorded errors number far less than those which the highest courts have committed and confessed in their innumerable overruling cases. As for myself, the longer I live and the more closely I observe the result of jury trials, the more I am inclined to agree with that English writer who says that 'when we consider the impartiality required and enforced in returning juries, and the properties which the law requires in every juror when returned, we may almost doubt whether human wisdom is capable of providing a more perfect method of determining the truth of facts consistent with the liberties of a free people; at least we may conclude that it has not hitherto done it.' 15 Virginia Bar Association Rep. (1902), 181-2. What is said by the learned justice commends itself very strongly. Juries make mistakes, but

their mistakes are probably no more numerous or no more disastrous to parties and the public than the mistakes of the judges.

"I do not say that no better tribunal will ever be devised, for it is wise not to discredit the ingenuity of man.

"It must be kept in mind, however, that the trial by jury which has merited and received the commendation of the past, and which is still receiving the approval of the present, is a trial by jury in accordance with the common law, that is a trial of facts by a jury of unlearned persons under the supervision and direction of a judge, and not a trial where the judge is prevented from even advising the jury as to the facts and giving them the benefit of his experience and observation.

"The judge should not have power to constrain the finding of the jury on a disputed question of fact, but he should be permitted to advise them on all questions arising in the case, both law and fact, being careful, however, to keep the jury fully advised that they are the final arbiters and his instructions as to the facts are intended merely to aid, and not to coerce.

"Experts may be called as witnesses on questions involving opinion, but the jury are at last to form their own opinion and are not bound by the testimony of the expert.

"Why not permit the jury to have the opinion of the judge on the facts, to be followed or disregarded as they deem proper?

"Some may say that in what I have said I gave voice to the views of an expert, and thus stand condemned already by my own words.

"I speak as a practitioner and as a lawyer. While I have admitted that a lawyer is an expert, it has been shown that he is not an expert of near so limited range as a judge.

“It may be thought from what has been said that I have simply laid the foundation for taking the position that a trial by jury should be had in all cases of indirect or constructive contempts. Nothing is farther from my purpose. I take no such position. I hold exactly the contrary view. What I have said must be taken as referring to the solution of questions of fact which are for determination at the final hearing, and not to collateral issues or interlocutory hearings.

“No one, so far as I am advised, has ever contended that in the case of a direct contempt the fact constituting the contempt should be found by any other tribunal than the judge.

“If it can be seriously contended that the judge whose order has been disobeyed out of court, should not be allowed to hear this question of contempt thus arising for fear that his feelings of indignation might prompt him to do an injustice to the party alleged to be in contempt, with greater force it could be maintained that the judge who had been insulted, defied and whose authority and dignity has been trampled under foot in his very presence, should not be allowed to pass upon the guilt or fix the punishment of the offender. If the natural feeling of indignation and resentment would ever find a voice in the breast of a judge it would be under such conditions—and still no one, no matter how low his estimate of the judiciary, or of particular judges has ever had the temerity to contend that in such cases the services of another judge or jury should be invoked.

“Constructive contempts—that is, contempts out of court—may possibly be divided into two classes:

“First, where there has been a disobedience of an order, which furnishes the jurisdictional fact, but the summary remedy of attachment is provided primarily for the benefit of the injured party, and the punishment provided is

a pecuniary penalty, the amount of which is fixed by the damages sustained, and this penalty is paid directly to the injured party, or for his benefit, the public reserving no interest in the penalty when paid.

“Second, when there has been a disobedience of an order, and the character of the case and the circumstances of the disobedience are such that the only matter that can be properly considered is the authority and dignity of the court, and the summary remedy of attachment is provided primarily for the purpose of upholding the authority of the court, and vindicating the majesty of the law, the parties litigant being for the time lost sight of, and giving no interest in the penalty, but the penalty, whatever it may be, being imposed in behalf of the public and for the preservation of peace and good order.

“If there can be such a division, there can be no objection to the interposition of a jury to try the facts in the first class.

“The Act of 1840, providing a jury trial in cases of rules against officers, the penalty imposed being the payment of the amount collected or the damage sustained to the party entitled and imprisonment to enforce this payment, deals with cases under the first class.

“The Act of 1892, providing a trial by jury in cases where a defendant is required to pay over money in his possession to a receiver for the benefit of his creditors and imprisonment to enforce the payment, may possibly be classified in a similar way, but this class of cases seems to be near the border line.

“I have not discussed the question of the constitutionality of these two acts. No question has ever been raised as to either.

“If they are valid, they have certainly carried jury trial far enough, and the power of the court to vindicate its authority in a summary way, so as to impress the people with the binding force of judicial orders by the prompt

punishment of those who disobey them should not be further impaired by making such proceedings subject to the delays incident to the trial of an ordinary case.

“The delays incident to the trial of the ordinary case are claimed by some to be the reason why the courts do not always command the respect of the people, and this view is taken by those whose natural tendencies are lawless and made the pretext for flagrant crimes involving both life and property.

“If these complaints as to the delays in the trial of an ordinary case are well founded and disrespect of authority and disregard of law is the consequence, how much more would the authority of the courts be brought into reproach if the very right of the court to exist and perform its functions was dependent upon a proceeding fraught with the same or similar delays?

“One who intentionally and wilfully disobeys the lawful order of a court of competent jurisdiction and thus demonstrates his disrespect for constituted authority, and his own lawless tendencies, should be promptly, speedily and adequately punished to impress upon him and others of like character that the courts stand for the preservation of order and the maintenance of peace.

“The popular prejudice against the injunction and the enforcement of injunctive orders by attachment for contempt is of no recent origin.

“Mr. Stimson in a recent work thus traces its origin:

“The common law sounds in damages. In early times it was enforced, civil and criminal, only by a money penalty, or by personal redress or vengeance. Thus, the earliest codes or statutes merely fix a scale of penalties. The notion of compelling a freeman to do something or to abstain from doing something was foreign to Anglo-Saxon ideas of liberty. Like the doctrine of free will carried to its extreme, a freeman was lord of his own acts, only liable for the consequences of the same to the person injured,

later only to the Crown, if a criminal act, and to the individual injured if a private wrong. Even when the judgment of the court went against him, the defendant was never compelled to *do* a thing or even, in ordinary cases, to make restitution, as in the Oriental system of rendering justice. This principle must never be lost sight of, for it explains many things, both in local history and in popular prejudice. Probably the power of the chancellor to issue injunction writs went as far towards prejudicing our ancestors against the courts of chancery and star chamber (which was merely its criminal side) as the absence of the jury and the local county court. Repeated attempts to limit or do away with this jurisdiction are found in the statutes of the realm, and the general prejudice against chancery courts came to our ancestors by direct inheritance.' Stimson, Federal and State Constitution, 24.

"When the chancellor is deprived of the power to enforce obedience to his orders by a summary proceeding attended with the least possible delay, the integrity of the court is not only destroyed, but the rights of property, which can only be adequately protected by the exercise of the jurisdiction of such a court, are also imperiled, if not entirely destroyed.

"We have in this State interposed the jury in the trial of equity cases at the final hearing. This change does not at all involve the integrity of the court. In England the chancellor could, in his discretion, send issues of fact to the common law courts to be tried by a jury. In Georgia we have simply made mandatory that which was in England permissive. No chancellor in England ever sent to a common law court for a trial by jury an issue of fact growing out of an attachment for contempt. To have done so would have amounted to an abdication.

"It has been said that the jury was a barrier interposed between the judge, who was a representative of the

Sovereign, and the people, in order that they might not be made the victims of the arbitrary will of the Sovereign.

“Whether this be a correct analysis of the system, certain it is that the jury has constituted such a barrier in many cases.

“When the servile judges of a malignant Sovereign attempted to destroy the life of the Earl of Shaftsbury it was the grand jury that thwarted the purpose, and this, too, notwithstanding that they were required to hear the evidence in open court, a proceeding contrary to all precedent, and adopted that the judges might overawe them by their presence and their questions.

“In this day and in this country the Sovereign is in the jury box, and in some cases it is necessary that the judge be interposed as a barrier to prevent rights which are recognized and protected by the Constitution from being arbitrarily disregarded or capriciously cast aside.

“It may be said that it is illogical and inconsistent to advocate the right of trial by jury as to some issue of facts and deny it as to others.

“The logician is a specialist and an expert, and like all experts he may be safely followed to a certain point, but beyond that we cannot permit ourselves to be carried. From the necessity of the case we are often compelled to do those things which are illogical and apparently inconsistent, and sometimes actually so.

“The affairs of life in its varying phases can no more be guided at all times and under all circumstances by the rules of logic than it can be by the rules of mathematics or any any other science.

“What is more logical and consistent than to tell the truth, and still the law sometimes, and wisely, suppresses the truth.

“Chief Justice Bleckley, in one of those remarkable addresses of his on Truth, tells us that the preservation

of society itself depends on the suppression of truth ; that if all truth was active and none allowed to lie passive, that the foundations of society would be uprooted.

"The slightest change in circumstances and conditions will sometimes render that inappropriate which would otherwise be altogether appropriate. One who overlooks or disregards the difference in conditions is ready with the cry of inconsistency.

"Let us not be deterred from advocating different remedies for the evils that are to be encountered in the administration of the law, merely because some who do not appreciate the variation in conditions may class us as illogical and inconsistent.

"O, consistency, thou art a jewel!" is the utterance of a poet, expressive of that which can only have its origin in the reflections of a dreamer—and oftener quoted to deter one from passing from error to truth than those inclined to pass from light unto darkness.

"If all judges, all legislators, all makers of constitutions had been for all time both logical and consistent, what would be the condition of the world to-day?

"It has been said that the right of a female citizen to vote can be established in a syllogism that is absolutely faultless.

"This is no doubt true, and still how unkind it would be to make this class of citizens the victims of pure logic.

"What is more illogical and inconsistent than the dual form of government under which we live; still it will last so long as the limitations of the Constitution are respected and obeyed.

"What is more illogical and inconsistent in a popular government than conferring the power upon one man to defeat the will of a majority of the people and a majority of the lawmakers, and still the only debatable question relating to the veto power of the executive is whether it should not be absolute instead of conditional.

“What is more illogical and inconsistent than to invest five lawyers with the absolute power to determine whether a statute, demanded by a majority of the people, enacted by a majority of the lawmakers, who are sworn to support the Constitution, and approved by an executive, who is likewise sworn to uphold the Constitution, is in violation of the provisions of the Constitution; and still experience has shown that this power is wisely placed in this small body of citizens, clothed for the time with judicial authority and responsibility.

“Remove all the inconsistencies from the Constitution, frame each clause so that its verity could be demonstrated in a syllogism, and our institutions are at an end.

“Let us hear the conclusion of the whole matter. In controversies between citizen and citizens or between the public and the citizen, when the integrity of the court is no part of the controversy, it is wisest to allow the jury to be interposed to determine the questions of fact in the final issue.

“In controversies, where the very existence of constituted authority is imperiled, the judge, the exponent of the law, the representative of authorized government should be left with a hand free to protect the structure which is confided to his care.

“The past has produced American judges who were fully sensible of the responsibility which their official station placed upon them and who possessed the courage to perform their duty in a manner firm and fearless.

“The present shows American judges of similar character.

“The future will continue to bring forth such judges so long as the standard of the American lawyer represents adherence to truth and devotion to the principles of constitutional government.

“I am conscious that I have faithfully complied with at least one promise made in the beginning, that is, that

I would make digressions. I have digressed. I have said things that bear only remotely upon the subject in hand, but which, by the exercise of some ingenuity can be shown not to be entirely foreign.

“More than a quarter of a century ago an address was delivered before the Alumni Society of the University of Georgia at Athens, by a prominent lawyer of middle Georgia, and after the exercises Judge Martin J. Crawford was asked his opinion of the address and his reply was: ‘It was almost exhaustive, it had everything in it except a receipt for soap.’

“If the paper I have read shall be placed by those who have heard it in a similar class, I request that if there is anyone present who has really a good receipt for soap, that it be furnished to me and I will add it to the paper and thereby make it not almost but altogether exhaustive.”

ADDRESS

OF

HON. WILLIAM RENWICK RIDDELL

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THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

BY HON. WILLIAM RENWICK RIDDELL, KING'S BENCH, DIV. H. C.
J., ONTARIO, CANADA.

In the early part of the present year, I had the honor to be invited to a dinner given by the Bar of Augusta, Georgia, to the then President-elect, the Honorable William Howard Taft. With that brotherly feeling which so characterizes those in the law, the Bar had, upon hearing that there was a Judge from Canada sojourning amongst them, most courteously expressed a desire that I should join them; and they further flattered me by asking that I should speak. In the few remarks which I addressed to that brilliant gathering I took occasion to say a few words about the Judicial Committee of the Imperial Privy Council—and I am informed that these were found very interesting by many of the lawyers present. My friend Dr. John Davison Lawson has told me that that subject would be as interesting to the lawyers of Missouri as it was to those of Georgia, and has chosen it as that upon which I am to address you. In what I shall say I make no pretence to originality—I take my information from many sources without acknowledging any.

There is no little doubt as to the very early history of the King's Privy Council and as to the appellate jurisdiction exercised by it. The jurisdiction is in theory that of the King, who is the sole fountain of remedial justice—he must correct and redress all defects, abuses, corruptions of all tribunals—he is the Chief Magistrate of the Community.

Very early indeed, the practice grew up that the King's will and pleasure should be manifested, testified, **tested**—by a document; and indeed, a document, it is obvious, must be necessary to convey the King's will to any place not in his immediate vicinity—"a verbal message could not be authenticated." The early monarchs were not very literate; and they needs must employ someone who could read and understand the "writ" when written; and soon a seal too was used as a means of authenticating the document containing the Royal command. And quite early an officer called

the Chancellor became the custodian of this seal; it was at first in fact, and thence hitherto in theory the function of the Chancellor to see that the "writs" accurately set out the intent, and that the seal of the King was attached to the "writs" of the King.

Then, again, it was, before really historic times in England, impossible for the King to exercise his primary and first duty, that is, to judge; and it was necessary that he be assisted by a Council—and that duty exercised by the King in Council—the earliest recorded form of exercise of such duty—is still exercised in form in the same way. But by the theory of the Common Law, the King does not exercise original jurisdiction—he only sees to it that the Courts do justice. It is then not properly speaking by way of appeal that this jurisdiction is found historically to have been exercised but by an interposition by the King to enforce a due administration of justice by the local Courts and to prevent abuse. Much of this power was later exercised by the Court of King's Bench—and is now, by the High Court of Justice, its successor.

After the Courts of King's Bench, Common Bench and Exchequer had become differentiated and split off from the King's Council, and these had their respective jurisdictions mapped out, there still remained a considerable part of the original jurisdiction of His Majesty's Council not appropriated. There arose the Court of the Chancellor which administered Equity, so called. As is well known, this Court became ultimately as much bound by established principles and decided cases as any Common Law Court. Once, however, the regular Courts of Law became thoroughly established, there arose a great jealousy of the jurisdiction of the King in Council—the Courts were *coram populo* and decided cases upon established principles, the Council was secret and was a law unto itself. And still after as before the institution of the Court of Chancery, the King's Council continued from time to time to exercise "a kind of extraordinary and corrective jurisdiction to prevent violence, corruption or in-

timidation; and especially combination and conspiracy to obstruct or prevent the course of justice."

But still much jealousy continued to be manifested from time to time at the exercise of this extraordinary jurisdiction (the jurisdiction of the Courts was ordinary) by the ancient body—salutary and necessary as it in many cases undoubtedly was. At last it was thought proper to give statutory authority to its proceedings and a Statute was passed in 1487 (3 Henry 7, C. 1). Before this Act the King's Council sat as a rule in the Star Chamber, and when the legislation came to be passed, it mentioned specifically "the Court of Star Chamber." This, as Hallam long ago showed, was a kind of Committee, that is a **Judicial Committee**, of the King's Privy Council. The Court of Star Chamber (as has been shown by recent investigation of its records, still extant) in many cases acted not as a statutory body at all but under the original Common Law jurisdiction of the Privy Council; and indeed did not conceive of itself as being of statutory origin. Moreover, the Privy Council also continued at times and in certain cases, e. g., in cases of riot, to act outside of the Star Chamber and as the Privy Council had acted before the Statute. Whether the "Court of Star Chamber" was a Court appears within a few years after the passage of the Act to have been questioned by the Common Law Judges; the great authority of Coke is that the judgment of these Judges was a "sudden opinion."

Now, it must be remembered that this jurisdiction of the Privy Council was not appellate; appeals, so far as they were allowed at all from the Courts of Law, went to the Court of Error, or to the Lords—from the Admiralty to the King in Chancery, that is in practice to a Court of Delegates and from the Ecclesiastical Court to the Pope, that is in practice to Delegates appointed by the Pope. After the Reformation, in 1532 (24 Henry 8, c. 12) appeals to Rome were forbidden; and the next year (25 Henry 8, c. 17) it was provided that appeals from the Archbishop's Court should be to the King in Chancery. He appointed Delegates forming a High Court of Delegates to hear these appeals. As the Privy Council was

not a Court; it followed that upon the abolition of the "Court commonly called the Starchamber" (by 16 Ch., 1, c. 10) in 1640, there was no Court (properly so-called) of the King's Privy Council. The same Act provided also that neither the King nor His Privy Council should have jurisdiction over the estates of any of the subjects of the kingdom, but that all questions respecting the same should be tried and determined by the ordinary course of law in the ordinary Courts of Law (Sect. 5).

In saying that no appeals lay to the King in His Privy Council, it must be borne in mind that reference is made only to appeals from the Courts of the Kingdom—the first duty of the King being to see that justice was administered to all his subjects, and that duty being exercised by him in Council, it followed that in the case of all subjects not within the kingdom, there was the right of appeal to the King in Council. It accordingly was always the theory that subjects out of the kingdom might bring an appeal—e. g. in the Channel Islands. Until quite modern time, however, these islands and all other foreign dependencies were unimportant; so that we do not find until the 17th century, any appeals recorded from without the kingdom. The Act of 1640 did not take away this appellate jurisdiction; and in 1667 a Committee of the Privy Council was formed to hear appeals of such provisions, and this Committee was formed by the Council and not by Parliament. After the Revolution of 1688, the appeals began to increase, and in 1691 an order was made by the Council, "That all appeals be heard as formerly by the Committee who are to report the matters so heard by them and with their opinion thereon to the King in Council." Early in the 18th century, Colonial appeals began to come in in some considerable numbers, and these were heard by this Committee, a part of the Council, who after hearing argument reported their decision to the Council. All this appellate jurisdiction was a matter of constitutional usage only and not derived from any Statute.

Appeals from India, however, were regulated by Stat-

ute; the right to appeal was first given by Statute in 1773 (16 Geo. 3, c. 63), the appeal being to the King in Council. The Council referred these to a Committee appointed by itself.

In 1832 (by 2 & 3 Wm. 4, c. 92) the appeals in Ecclesiastical matters which since the Reformation had been to the High Court of Delegates, as well as appeals in Admiralty, were transferred to the King in Council. The following year the Statute 3 & 4 Wm. 4, c. 41, was passed which regulated the constitution of the Judicial Committee for the hearing of appeals—which Committee was to consist of the Lord President of the Council, the Lord Chancellor, and such members of the Privy Council as shall hold the office of the Lord Keeper, First Lord Commissioner, Lord Chief Justice, Lord Chief Baron, Master of the Rolls, Vice-Chancellor of England, Judge of the Prerogative Court, Judge of the Admiralty, the Chief Judge in Bankruptcy, and all Privy Councillors who shall have held any of these offices—to which the King by sign manual might at any time add two other Privy Councillors.

By the same Statute of 1833 it was provided that all appeals from the Admiralty, Vice-Admiralty, or other Courts abroad which theretofore had lain to the High Court of Admiralty in England should be to the King in Council.

By the Act of 1832 (2 & 3 Wm. 4, c. 92) the appeals which in Admiralty cases had from even before the 25th Hen. 8, gone to the King in Chancery and so were heard by the Court of Delegates, were transferred to the King in Council. So by 1833, we have the King in Council vested with the statutory powers of hearing Admiralty and Ecclesiastical appeals, and still continuing to exercise a power which did not depend upon Statute of supervising the proceedings of all Courts in the British Dominions not within the four seas. All these appeals—all appeals to the King in Council—were to be referred to the Judicial Committee who were to report to His Majesty in Council. By this Act two ex-Judges from India or beyond the seas were also provided for. Further Ecclesiastical appeals were provided

for in 1840 (3 & 4 Vic., c. 86); this Act also got rid of an anomaly—Ecclesiastical appeals could theretofore have been heard without a single Bishop or Ecclesiastical Judge being upon the Committee—this Act provided that every Archbishop and Bishop of the United Church of England and Ireland who should be a member of the Privy Council should be a member of the Committee for the hearing of such appeals and one at least be present. Another Ecclesiastical appeal is given in 1874 (37 & 38 Vic., c. 85), and in 1846 (27 & 28 Vic., c. 21) an appeal is given in prize cases. In 1871 (34 & 35 Vic., c. 91) provision was made for four Judges or ex-Judges of the Courts at Westminster or in India being appointed.

Then came the Supreme Court of Judicature Act of 1873, whereby all Admiralty appeals were taken away from the Committee; and in 1876 the provision was made for four Lords of Appeal in ordinary at a salary of £8,000 each to sit in the House of Lords and if Privy Councillors, also in the Judicial Committee.

In 1877, all jurisdiction on the part of the Queen in Council in matters of appeal from Ireland was abolished. In 1895 a very important provision was made that any Judge or ex-Judge of the Supreme Court of Canada or any superior Court in any Province of Canada of Australia, New Zealand Cape of Good Hope or Natal, who should be a Privy Councillor should also be a member of the Judicial Committee.

At the present time this Judicial Committee hears appeals in English cases only in Ecclesiastical matters. Upon every appeal of this character, at least three Bishops must sit as assessors, under the provisions of a rule made in 1876. The ultimate appeal in other matters goes to the House of Lords. In Scottish and Irish matters the Committee does not exercise any appellate jurisdiction whatever. But from Courts all over the world, wherever the map is marked with red, come appeals. In Europe, from the Channel Islands, the Isle of Man, Gibraltar and Malta as well as from Cyprus; in Africa from the Cape of Good Hope, Natal, the

Transvaal, the former Free States, the Gold Coast, Sierra Leone, Zululand, Rhodesia, St. Helena, Lagos, Basutoland, Bechuanaland, the Falkland Island, Mauritius, Gambia, Griqualand and other "lands" more or less unknown; in Asia from Bombay, Calcutta, Madras, the N. W. Territory, Aden, Assam, Beluchistan, Burmah, Upper and Lower Oudh, Punjab, Ceylon, Mauritius, Hong Kong, Borneo, Labuan; in Australasia, Australia, New Guinea, Fiji, New Zealand, Norfolk and Pitcairn Islands and in America from Canada and her Provinces—Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, Manitoba, Saskatchewan, Alberta, British Columbia, and from Newfoundland, Bermuda, the Bahamas, Jamaica, British Honduras and from Guiana in South America and many another British Island lying in that Caribbean Sea.

The laws of a score of self governing communities must be interpreted, the English Common Law of the English-speaking colonies modified by local Statutes; in Quebec the Coutume de Paris with similar modification; the many varying and various laws of the many East Indian peoples, the Roman Dutch law of the South of Africa, the still more complex law of Malta—all these and more come before that Assembly of Jurists.

And who are they? In theory the Judicial Committee consists of the President of the Council past or present and all members of the Privy Council who may hold or have held judicial office as Lord Chancellor or Judge in the Supreme Courts of England, Ireland or Scotland, two other persons appointed by sign manual, one or two Judges from India, four Lords of Appeal in ordinary and all past Lords Justices of Appeal who are members of the Council and not exceeding five Chief Justices from Canada, Australia or South Africa. Most of these must, of course be lawyers, yet not all.

At the present writing sits as Lord Chancellor Lord Loreburn, who as Sir Robert T. Reid was one of the most learned as well as one of the most ingenious of Counsel;

and with him is the veteran Ex-Chancellor Lord Halsbury (once Sir Harding Gifford) whose mind has lost none of its acumen and who is paying the debt which every lawyer owes to his profession by editing a Commentary on the Law of England which must be as valuable as it is comprehensive. Lord Wolverhampton the Lord President, but lately Sir Henry Fowler, is also a lawyer—but he never was a Barrister—he belongs to the lower branch of the profession; he is a Solicitor. He could never have pleaded a case in any High Court of Justice but may sit upon this the ultimate Court of Appeal for a territory greater than the ancient Roman ever thought of. And he has, I am informed, sat in at least one case. There are five ex-Lord Presidents—all peers of the realm and all laymen, these in practice never sit—one ex-Lord Chancellor of Ireland, Lord Ashbourne (Edward Gibson,) Lord Macnaghten, once an Irish Judge of note; Lord James of Hereford who as Sir Henry James gave up his opportunity to become the Lord Chancellor of Great Britain, the greatest prize to which an English lawyer may aspire, for the sake of principle which he would not sacrifice, Lord Lindley (the Lindley on Partnership), Lords Dunedin and Shaw of Dumfermline, giants from the Scottish Bench and Bar; Lord Alverstone (Sir Richard Webster) Lord Chief Justice of England, Chairman of the Alaska Arbitration Board; Lord Atkinson a brilliant Irishman and Irish Barrister appointed a Lord of Appeal in Ordinary from having been Attorney-General for Ireland; Lord Collins once Justice of the Queens (Kings) Bench Division and later Lord Trustee of the Court of Appeals and Master of the Rolls; Sir Edward Fry (on Specific Performance) and Sir Fred North, both Judges of great ability and long experience; Sir Alfred Wills for years the senior Puisne Justice of the High Court of Justice; Sir Henry Strong and Sir Elzear Taschereau former Chief Justices of the Supreme Court of Canada; Sir Henry DeVilliers formerly a Chief Justice at the Cape of Good Hope in South Africa, and Sir Samuel Way and Sir Samuel Griffith who occupied similar

positions in Australia; Sir Andrew Seoble and Sir Arthur Wilson distinguished Indian Judges; Sir John Bonser formerly Chief Justice of the Straits Settlements and afterward of Ceylon. And there are others who may be called upon—indeed all who are or have been occupants of high Judicial office and are Privy Councillors are members of this Committee.

When there is an Ecclesiastical appeal, Archbishops and Bishops also sit—as Ecclesiastical assessors; in the rare case of an appeal from beyond the seas in an admiralty matter, Admirals or other naval officers sit as naval assessors. For example in the well known case, *Read vs. Bishop of Lincoln* (1892, A. C. 644) the Bishops of Chichester, St. Davids and Lichfield sat; and in a case from His Majesty's Supreme Court for China and Corea in 1908 (A. C. 251) Admiral Lloyd and Commander Caborne.

I have said more than once that this body is not a Court, it is a Committee appointed to consider certain legal questions and report thereon to His Majesty's Privy Council. There is no instance in which all those who are qualified actually sit; I have never seen more than seven—nor less than four; three exclusive of the Lord President constitute a quorum. These Privy Councillors are clothed as ordinary English gentlemen without official garb of any kind although Counsel appearing before them must wear the black gown, silk or stuff according as he is or is not a King's Counsel, bands of white lawn and wig of horse hair. In Ontario we wear all these except the wig, but I found that one becomes accustomed to the wig very quickly and very easily. I presume it strikes the Englishman with the same sense of incongruity when he enters our Courts and sees Judges and Counsel with gown and white bands but without wig as it does an Ontarian when he sees certain American Judges sitting in Court with a gown but also with a black necktie.

Being a Committee and not a Court, the decision a report, no dissent is expressed—one of the Committee gives the opinion of the Committee and no one knows in any case

how the members of the Committee were divided or if they were divided. While the House of Lords is bound by its own judgments, such is not the case with the Judicial Committee—the Committee may and sometimes does decline to follow the law as laid down in previous cases. Their Lordships consider themselves at liberty and indeed bound to examine the reasons upon which a previous decision was arrived at, and if they find themselves forced to dissent from those reasons, to decide upon their own view of the law. I do not know that this has ever actually been done in questions of the law of property, but it has in matters affecting the forms of worship, etc., in the Church of England. For example in the well-known case, *Read vs. Bishop of Lincoln* (1892 A. C. 644) the previous decision in *Hebbert vs. Purchas* (L. R., 3 P. C. 651) 23 years before, was not followed, as their Lordships found themselves unable to concur in the reasoning. It has, however, been said—even in a case involving property—by the Committee (upon a previous case before that Board being cited as an authority absolutely binding upon them) that it would have been their duty had the necessity arisen to consider for themselves whether the decision was one which they ought to follow (1891, A. C., at p. 282).

The Committee sits in an old building on the north side of Downing street, Westminster, not far from the Abbey and the Parliament Buildings. The Board is on the floor toward the middle of the room; the Counsel upon a raised platform to the east side, communicating with the robing rooms etc. The platform is accommodated with a small reading desk upon which Counsel addressing the Board may rest his books and papers—all the proceedings in the Courts below are in printed form as also the points relied upon by each side. Whenever a case cited is not thoroughly well known the report is brought at once from the book-cases lining the walls of the room; and each point as a rule is thoroughly threshed out at the time by Court and Coun-

sel, so that even if judgment should be reserved Counsel generally know pretty well what the result will be.

In addition to appeals heard, there are a great many petitions for leave to appeal. These are generally disposed of on the spot—I have seen four in one short forenoon.

And what kind of cases come before them? I take up the June number of the Law Reports, Appeal Cases, and find the following: an appeal from New South Wales upon the construction of a will; from the Supreme Court of Nova Scotia as to the interpretation of a contract involving millions; from the Supreme Court of Hong-Kong, China, as to whether certain alleged perjurers could be committed to prison without certain formalities; from the Straits Settlements as to the effect of an ordinance forbidding the importation of chandu; from the Supreme Court of Canada as to whether the Grand Trunk Railway must carry passengers third-class between Toronto and Montreal for one penny a mile as provided by the Statute of 1852; from the Court of King's Bench, Quebec, as to the right of a corporation owning certain patents to enforce the provision in a lease of machines built on the patents, that no other machines should be used by the lessee; from the High Court of Australia in respect of the construction of a Customs' Act; from the Cape of Good Hope on the construction of a will; from the High Court of Australia as to the rights of a civil servant to compensation on retirement; from the Supreme Court of Canada as to the admissibility of a railway map upon a trial and the effect of its admission; from the Straits Settlements (the Settlement of Penang) upon a bill of lading; from the Supreme Court of Ceylon as to the illegitimacy of children procreated in adultery (this depends upon the Roman-Dutch law, the common law of Ceylon.)

I have not said anything about the cases from India, as these appear in another series and not in the Appeal cases. It may, however, be of interest to mention some of these cases reported in 1906, (the report I have at hand.)

Appeal from the Judicial Commissioner of Oudh as to the power of a Hindo widow to execute deeds to her son-in-

law under the custom amongst certain Chattris; from the High Court at Allahabad as to the effect of words "malik wa khud ikhtiyar" in a deed of gift; from the High Court of Bengal as to whether a plaint must be stamped; from the Judicial Commissioner of the Central Province as to the construction of a foreclosure decree; from the Chief Court of Lower Burma as to Buddhist marriage and the status of "monkey wife"; from the High Court of Bengal whether the English law as to champerty and maintenance is part of the law of India; and again as to the Mahomedan law of gift under apprehension of death (our donato mortis causa,) and again as to the rights of shareholders in a Zemindart, and again as to gifts to daughters and their sons; from the Chief Court of the Punjaub in respect of a partition of the property of a Hindu joint family; from the Supreme Court of Mauritius as to certain wakf properties in Port Louis bought for the Mahomedan congregation of the Soonee School, being composed of Indian immigrants from Cutch, Hallal and Surat, the Hallaye and Soortee classes quarrelling with the Cutchees; from Lucknow as to family records proving pedigree, and the rights of a sister's son; from the High Court at Madras as to the rights of the Nadar or Shanar caste to worship in the temple of Shiva at Kamudi; from the High Court in Bengal again as to jhum rights, i. e., rights in land in wild and jungly tracts on the frontier which were never brought under settlement by the Revenue authorities but were left waste to be occupied by "squatters"; from the Chief Court of the Punjaub in a suit by Hindu minors to set aside their father's deed of sale on the ground that the lands were ancestral.

With all these varied forms of action, all the different systems of law to be considered, Common Law, civil law, Mahomedan law, Roman-Dutch law, and all the bewildering customs of India, there is no delay in giving judgment. The case is a rare one in which the appellant does not know his fate within a few weeks at the outside. A case may start in Toronto to-day and be finally decided by the Privy Council in a year or 18 months from now. No delay is toler-

ated—cases do not dally along year after year by arrangement of Counsel—an appeal is decided promptly. The great eminence of their Lordships—their unquestioned ability and impartiality—make their decisions worthy of all respect; and they are respected.

But, it may be asked, “Why have a Court of this kind at all? Why do not Canadians have their cases decided and finally decided by Canadian Courts without an appeal across the Atlantic? Is it not belittling that in some cases litigants look for final relief out of the Dominion?” This kind of objection I have heard more than once from members of the Bar and Bench of these States. I would enquire “What is the use of the Supreme Court of the United States? Why do not Missourians have their cases decided and finally decided by Missourians without an appeal across the Mississippi? Is it not belittling that in some cases litigants look for final relief out of Missouri?” There is no Missourian upon the Bench of the Supreme Court of the United States altho’ we have two Canadians on the Judicial Committee.

There is an advantage that the members of the Board are removed from the scene of the facts upon which litigation arises—they cannot be thought to be influenced by public opinion or public clamour—in questions of great constitutional moment—which have awakened party discussion and party feeling, they are away from and above party—in matters of public policy they cannot be conceived of as influenced by any other consideration than Justice and the public good. They also are in a position to do much toward making the law uniform in all Common law countries.

Far above all, to my mind, is the idea of fundamental union in all British communities—made manifest in concrete form in one great Court of Appeal for all the lands beyond the seas. In that Court, too, sit as a rule the very men who sit in the House of Lords to decide as a final Court of Appeal, disputes between our brethren of England, Ireland and Scotland—so that we are all one. Those who fought for the union of these States will know and appreciate the pat-

riotic desire for union—a flag, an institution, will symbolize a sentiment; and to me there is no more inspiring spectacle than that body of gentlemen in the dingy old room on Downing street, Westminster, sitting to decide cases from every quarter of the globe, administering justice to all under the red-cross flag and symbolizing the mighty unity of an Imperial people—a people akin to yourselves, with the same problems as you and with the same aims.

A sentiment more powerful and efficient than a law binds together these groups scattered throughout the globe. One name we bear, one flag covers us, to one throne we are loyal; and that Court is a token of our unity. Not as a member of a subject race does a Canadian enter the precincts of that building, but as a citizen and an equal, legally, socially, politically—the Canadian barrister stands beside not below and not above, his brother from London, or Edinburgh or Dublin or Melbourne or Sydney or Wellington or the Cape. No precedence is given to a King's Counsel from his receiving his patent at the hands of the Lord Chancellor of Great Britain rather than at the instance of the Attorney-General of a Colony. All meet before a tribunal representing the common Sovereign, a tribunal, too, which links the present with the ancestral institutions of our race. With many of the present as of every past period, there is a desire for novelty and experiment. But it is part of the very being of those deriving from our common ancestors to cling to the old in essence, even if a change be made in form to the new. It is no little gain that we are able to point to this body as being in substance the same as has sat and adjudged—doomed—for countless generations amid and for a free and noble people, who law-loving and in general law-abiding, could brook in patience no law but their own. Before that tribunal we must if ever recognize that the principles of justice and fair dealing are the same now as of old—the varying and various conditions of society have not modified eternal right—the law (speaking generally) which the Saxon was entitled to have enforced in his local Court is the same as that by which are now governed mighty

organizations carrying on enterprises not only unthought of but unthinkable by him. And whole nations of men in lands far removed from England, inhabiting climes of which the Saxon and Norman could not even dream, see their rights finally determined by a body of men in an assembly which has subsisted without a break since Saxon and Norman appealed to their Sovereign for and obtained from him through his Council, the justice which was denied to them by some Court of the vicinage, overawed perchance by a powerful Baron, litigant or patron of litigant.

No longer, indeed, are the local Courts of law in the British Isles supervised by that body of men, but Courts which pass upon the rights of millions of British subjects out of the old clime are daily having their judgments examined and where proper corrected by them. We feel ourselves one people indissolubly connected, not only with the early forefathers in the old land but also with those of our race scattered throughout the globe—we are one. And not the answer of the Colonies to the call of the mother land during the South African war or the firm stand taken by them more recently when her sea power was challenged, more shows that oneness than the common recourse to one final Court of Appeal.

Mankind's sense of law is one of the two things, (equaling in that regard the starry heavens) which filled the metaphysician with awe—and law has filled a great place in the history and the development of mankind—not in the history and the development of mankind—and not least so in those of that branch of mankind to which we, you and I, belong. The majesty of the law, so often sneered at but never belittled without serious results and evil brings an ever present sense of a moral government of the universe—that people who most respect and most readily obey the commands of the law are the highest in the scale of civilization. And how can the majesty of the law be better exemplified than in the existence of a body of jurists whose judgment is the final word for hundreds of millions—and for the full execution of whose decrees every ship in a navy

whose flags cover every sea, every man in an army with centuries of honour to its credit, every officer of the State, every British subject who can carry a musket, may be called upon if necessary.

There have been occasions upon which suggestions have been made, more or less seriously, that the jurisdiction of the Privy Council over self-governing communities, such as we have in Canada and as are in Australia and New Zealand, should cease. For example when the Supreme Court of Canada was established in 1875, there was considerable discussion looking to the abolition of the right to appeal to the Privy Council from the Court so established. Wiser counsels prevailed and no attempt was made to prevent such appeals by legislation. Now an appeal lies as of right from the highest Court in each Province in cases of sufficient magnitude and also by special leave from the Supreme Court of the Dominion.

No feeling exists that this should be altered—occasionally of course the unsuccessful party to an appeal and those who sympathize with him make a doleful noise against the Board but this speedily dies out. It is wholly beyond controversy that Canadians generally would deplore any attempt to interfere with their traditional right to apply for justice to the foot of the throne.

In other Colonies the right continues in a more or less complete form—and from all appearances will so continue while the British Empire itself continues—and may that be not **ad multos annos** alone, but **in aeternum**.

"CANADA, HER LAW AND LAWYERS"

THE HON. MR. JUSTICE WILLIAM
RENWICK RIDDELL

of TORONTO (Kings Bench Div'n, H. C. J., Ont.)

In Response to the Toast at the

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ROCHESTER, N. Y., JANUARY 21, 1910

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Mr. President and gentlemen, I, a Canadian, would be destitute of all Canadian national feeling; I, a Judge and lawyer, would fail in professional pride if my heart did not as cordially respond to your reception as you have cordially received the name of my country, of my profession and of myself. (Applause.) One thing I wish to say in advance of all else, that while I am a stranger here in this city — *sub modo* — (for I can never be wholly a stranger when my friend Mr. Moot is beside me, and John G. Milburn, whom I never could call *Mr.* Milburn, is not far away), but stranger though I am, *sub modo*, I absolutely refuse to consider myself or to be considered a foreigner or an alien. (Applause.) And when I say that, I do not mean to refer to the fact that this great and sovereign State used to retain me as her counsel to represent her before Her Majesty's Courts in my native Province; although that is true, and I hope she found my services as valuable and useful to her as I found her service useful and valuable to me. (Laughter.) Neither do I refer to the fact that I am an honorary member of the Bar of two of the States of this Union; and so I come from Missouri. (Laughter.) When I came here you had got to "show me" (laughter), and you have done so — splendidly.

But I refer to something far more elemental, deeper and more far reaching. Any day after I close my Court in Osgoode Hall, at Toronto, I can take a train and go to the east, and by the morning be in another Canadian

city. Of course, as actors always go to the theatre when they have nothing else to do, so lawyers invariably look up a Court they can attend if they have a holiday. I am a Judge; but I trust I have not ceased to be a lawyer. As I told you this afternoon, these terms are not synonymous, because I know many a lawyer who is not a Judge and I have heard of Judges who are not lawyers. (Laughter.) There is indeed a well-known instance in our own province of a prominent member of the Bar, who when he received Her Majesty's patent appointing him a County Court Judge, at once proceeded to sell his library and buy a new gun. (Laughter.) Judge as I am, I have not been long enough on the Bench to forget the fact I am still a lawyer, therefore, I follow the lawyer's instinct, and look for a Court room.

I find a magnificent building surmounted by a flag which I have known from my infancy, the flag whose folds have guarded me through life. I come into the Court room and I see there a Judge garbed as myself (when I am in my official Costume); he has a black Queen-Anne-style coat, a silk gown, white bands; and he is addressed as "Your Lordship," or "My Lord," by members of the Bar. Some of these are King's Counsel; and there are others, too, separated by a bar, not the only bar that some practice at, it is said (laughter)—but at all events there is the same kind of bar as that which separates our Barristers. Everything looks exactly like my own Court in Osgoode Hall.

The Judge, too, has, like myself, received his mandate under the great seal of Canada. But wait a bit—the Judge begins to speak, and I look again at him. That is not the language I am accustomed to hear, it is a different tongue from that which I learned at my mother's

knee. The law he administers is strange, the doctrines are those I have not heard since I was at college, when I was a student of the civil law. As he goes on, I say to myself, "this is no my ain hoose."

But let me take the other direction; I go to the State of Michigan or I come to this State which is "good enough for me, little old New York," and I find a Court house there adorned by a flag, surmounted by a flag which is indeed not entirely strange to me, because I was born near a town to which many American visitors come; and our American friends never let us forget that the Stars and Stripes is *their* flag. (Laughter.) So much so, indeed, that when an American gentleman is asked to speak at a Canadian dinner, invariably and as a matter of course, the Stars and Stripes is floated in his honor. So I am familiar with the Stars and Stripes; and yet, it is not my own flag, although the very next to it. Then I go into the Court room and I see a Judge without robes or bands, dressed not in Queen-Anne, but in late-Queen-Victoria-style, and who has not, like my brother in Montreal, received a patent from the Crown, but his mandate comes direct from the sovereign people to whom he is immediately responsible. Attorneys address the Judge, to my astonishment — never having seen an attorney address a Judge in Court — and indeed I could not hear an attorney no matter how loud he might call. And counsel have no distinction of silk gown and stuff gown, for they have no gown at all; and it is much if they do not wear a red four-in-hand instead of white tie and bands. This is all passing strange.

But stay — I hear the Judge speaking. I recognize the language, the intonation perhaps slightly different from mine, but no more different than that of Ottawa or of

Windsor; and the law he lays down is the same, the principles of law are those principles which I am in the habit of invoking in my Court in Osgoode Hall. I recognize his language, I recognize his terminology, I even recognize his Latin — the pronunciation of it. (Laughter.) Because if I hear Latin pronounced correctly and according to quantity, I may indeed be in the company of scholars, but I swear I am not in the company of common-law lawyers. (Laughter.) His dress is not the same as mine; but his law is the same as mine, his tongue is the same as mine; and peoples who speak the English language and follow the English common law cannot be foreign or alien to each other. (Applause.)

Now, you all know, I dare say, the old story of the Scotswoman who said to her friend: "It's nae wonner we lickit the French at Waterloo; oor men prayed." "But," said her friend, "d'ye no think the French prayed too?" "Nae doo't; but wha could unnerstan' them, jabberin' bodies?" I do not vouch for the theology; but there can be "nae doo't" that a community of language goes a long way toward bringing about a community of feeling.

Gentlemen of these great United States of America, I am come to you from the North Land, with greeting from our beautiful Lady of the Snows. I am come to address you, my American — neighbors? — friends? — cousins? — no, I have not yet the word — but American brothers. (Applause.) I come here with greeting from the land of the maple leaf, the land of the northern zone. Within a period which may be reckoned by the years of one generation, she has shaken off from her beautiful limbs those shackles which bound her progress so long; she has risen from that state of lethargy in which too long she had been sunk, and with her splendid face set, she has risen upward

and onward to her true place among the nations of the world. No unworthy sister, no sister to be contemned, but a sister worthy to stand beside her older and stronger and richer brother to the south. (Applause.) The Premier of the Dominion of Canada, the other day, said that Canadians apparently did not appreciate their country, for, in public speeches, they do not magnify their country enough. I must plead guilty to that charge — not of want of appreciation of her merits, but of failure to glorify them. If my friend, Mr. Mowat, from Toronto, were to address you, he would tell you about Canada, he would tell you about Nova Scotia, down by the sounding sea, with her hardy fisher-folk, her fruit, her stores of coal and of gold; of Prince Edward Island, the true New Scotland of this hemisphere, but with a soil and a climate denied to the old; New Brunswick, with forest and farm; Quebec, the ancient and stately, with her cities — Montreal, sitting at the head of navigation and at the receipt of custom, nestling under her historic mountain, the mart for half a Continent's produce, a competitor not to be despised even by New York. And old Quebec — sitting as she does upon her rock, looking out upon the magnificent St. Lawrence, her rocky plain where Wolfe and Montcalm contended and died — does not there sit so lost in contemplation of her own beauty and charm that she fails to hear at her gate the knock of trade, or omits to answer the call of insistent commerce.

My own Province of Ontario, with her magnificent vineyards and orchards, with her splendid farms and noble forests, with her gold and silver, copper, and nickel, and iron. Manitoba, whose wheat sets the standard for the world. And the two sisters of the plain, the latest progeny of our Dominion, with ear bent listening for the tramp of the coming millions, with arms spread wide open to all the

nations of the world, asking and calling for men to come to them, men who desire to win a fortune or a competency through honest toil. British Columbia, once described as a "Sea of Mountains," with her giant trees, with her fruitful valleys, with her harbors where the fleets of the world might securely and serenely ride. And that new Canada which is still a Territory — it is no longer the call of the wild luring the adventurous, but hard-headed merchant finds his reward in the cities of the Yukon. The seeker for gold is no longer the single pioneer, wielding the solitary pick and rocking the lonely cradle, but the millionaire is there exploiting her plains and her rivers. Surely we have a goodly heritage.

But I shall not boast; a Canadian never boasts (laughter), simply and solely because he needs not — he has but to tell the plain truth about his wondrous land.

We govern ourselves; we are the loving subjects of the King of England, and that not because he is the King of England, but because he is the King of the British Dominions beyond the Seas. Our King is an integral part of the Parliament at Ottawa, of the Legislature at Toronto, and of the other Parliaments. We pay no tribute, we govern ourselves, we call no man master. (Applause.) The difference between Canadians and Americans is this, we have a monarch who reigns but does not govern; you have a monarch who is not a king, and, therefore, does not reign, but he does govern. William Howard Taft has more power in the city of Rochester than King Edward has in the Dominion of Canada. (Applause.) Governor Hughes has more in any village in the State of New York than King Edward has in the whole Dominion of Canada; not only King Edward, but all his representatives. We govern ourselves and we propose to do it; and there is no intention on anybody's part, that I know of, to try to prevent it.

Our law is the English common law — the same as your law — except so far as it is modified by legislation in the same way as your legislation. But we are not troubled by constitutional limitations. If our Legislature wants to take a man's land it does it; and it is said it sometimes does. (Laughter.) If our Legislature wants to put a stop to combines, it does it; and that is all there is about it. It is a perfect marvel to a Canadian lawyer when he visits an American Bar Association, or an American Court, to hear argument after argument, when hour after hour is taken up on the question, "Is this constitutional?" "Is that constitutional?" or "Is the other constitutional?" With us everything is constitutional so long as it comes within the list of subjects allotted to the Provincial Legislature or the Dominion Parliament, as the case may be. (Applause.) The other day a Judge (whom I should call learned, were it not myself) said in a judgment that the prohibition, "Thou shalt not steal," does not apply to the Provincial Legislature; and the Court of Appeal, while they did not use the same words, said, "We cannot reverse that judgment." (Laughter.)

Now, our Courts are very much like yours. We have the same troubles that you have in your Courts; I mean the lawyers have the same trouble with the Judges, and the Judges have the same trouble with the lawyers. (Laughter.) The Judges think the lawyers have not got their cases thoroughly prepared; the lawyers are perfectly sure the Judges do not understand a sound argument when they hear it. And then we have the same difficulty in making the general rule fit the particular case. We have the same difficulty in determining which set of witnesses is telling the truth, if either of them is telling the truth. We have the same difficulty in drawing a cor-

rect conclusion from the evidence of people who are not trying to tell the truth and of people who are, those who could tell the truth and won't and those—well, you know. (Laughter.) We have the same difficulty with labor and capital that you have—in fact, we have the same difficulties that you have from beginning to end—only we are not troubled with that bane, “constitutional limitations.”

Then, the Bar—what shall I say about the Bar? You see a specimen of it here in my friend, Mr. Mowat. I admit he is rather a favorable specimen of our Bar; but still you can to a certain extent judge of the rest of the Bar by him. The Bar is not the servant of the Court in our country; the Court does not even call to the Bar. Take my own Province as an illustration. Every five years every barrister in the Province of Ontario has a right to vote for thirty individual benchers. These, with certain benchers *ex officio*, *c. g.*, Attorney-General and ex-Attorneys-General, Ministers of Justice, present and past, retired Judges, etc., form “Convocation,” *i. e.*, a Senate. They fix the curriculum, the examinations; they appoint the examiners; they organize law schools; they appoint and pay the professors of the law; they examine and they call to the Bar—the Court does not. If any young man has passed all his examinations, they may call him, or they may refuse. The barristers are a corporate body under the name “Law Society of Upper Canada”—they govern themselves. They are, in short, a distinct body over which we Judges have absolutely no control. If a barrister desires to practice after he has received the degree of barrister-at-law at the hands of the Law Society of Upper Canada, he is introduced by a bencher to the Court. He is then sworn in before the

Court and signs the roll. Then he has a right to appear in Court. The Court cannot prevent a barrister, so called and sworn in, from addressing the Court; and the Court has no right and no power to allow anybody else to address the Court than one who has been called by the Law Society. The attorneys indeed are different, they are called by the Court; they are examined by the Law Society and certified as competent to the Court, but they are called by the Court and made officers of the Court.

All Judges must be members of the Bar of ten years' standing.

In the Province of Ontario, even if it be but a five-cent case, the litigant has a right to have the law in his case laid down by a Judge who has been ten years practising at the Bar of Ontario. (Applause.) We have no such thing in civil cases as "Justice of the Peace Law," which I understand is very much on a par with what Shakespeare calls "Crown's Quest Law." The other Bars are very much the same as ours; each Province has its own Law Society.

The barristers (attorneys or solicitors have no right of audience) are divided into King's Counsel and stuff gownsmen; but the latter have practically all the rights that have the King's Counsel. I cannot tell you the difference between them and the King's Counsel, except that the King's Counsel wear a silk gown and the others one of stuff. The King's Counsel have no extra privileges except they sit in the front row in the Appellate Courts, and are therefore as a rule called upon earlier, so that they sometimes have their motions sooner heard.

Now, I do not know that I should say anything more about our law with the exception perhaps of that

of the Province of Quebec. There the common law is not the common law of England; it is not the common law of New York State, or the common law of any of your States, except perhaps Louisiana. It is the civil law, based upon the old Roman law, based upon the French law; and let no man despise that law, let no man sneer at French-Canadian law unless he is prepared to maintain and prove that Coke was a greater lawyer than Tribonian, and Lord Mansfield than Pothier. The Roman law, which was the law of the ancient Roman, and which, if ever there be a universal law, will be the basis of that universal law, which is the basis of the law of Scotland, the basis of the law of France, which is the basis of the law of Germany — let no man despise that law unless indeed he happens to be like us, a common-law lawyer. Then, of course, he has a right to consider that absurd which differs from his own common law, "the perfection of human reason."

Now, what about the future? For a long time it seemed as though Canada was likely to be an appanage (commercially) of this great nation; it was deemed otherwise by the gods — and afterward by the manufacturers who nowadays, I understand, are playing, in great part, the role of gods in tariff legislation. The old Elgin Treaty was denounced. Hard times set in in Canada. Our trade was disturbed. But Canada found new avenues of trade, her trade went east instead of south; and now, at last, we are able to stand upon our feet and we are no longer seeking any concessions from this nation. We did more than once suggest more liberal trade relations. I think we are still open for negotiations for freer trade; but that is entirely for you; we are not going to seek it. If you think it wise, then I haven't any doubt our people will

gladly listen; but we have made advances too often, we have been snubbed too often, and proud people as we are (the same breed as yourselves), we shall not risk another rebuff. (Applause.)

We have made mistakes; people who do not make mistakes do not make anything else; but no man and no nation has time to worry or brood over past errors. The present is all we have; and I vastly mistake the temper of my countrymen if they are not determined to make the most of this present. We desire to live in peace and harmony with all men. We will, if we can, live in peace and harmony as far as trade is concerned; if we have to fight, why "by jingo," I suppose we will have to fight. (Applause.)

There was for some time a feeling among no small part of our people, including perhaps some of our public men, that it was the ultimate destiny of Canada to form part of this great nation. That feeling, so far as outward expression is concerned, is dead. We have made our choice. We have determined to remain Canadians and to remain British. This choice is irrevocable; so far as I can see, unless all history is false and the future belie the past, Canada will remain Canadian and will remain British. Such is our will — and there is no real fear of external aggression. In so saying I, of course, assume and take for certain that this great nation which has shown the world an example of self-abnegation in the case of Cuba, will never try to force an unwilling people to join their destiny with hers. (Applause.) The people of the United States of America value the citizenship of the United States too highly to give it to a nation of slaves; and they will not force themselves upon a nation of freemen. (Applause.)

Until well within the present century, there was no thought of any force except possibly from the south; and during

one hundred years and more, thank God, there never has been trouble so acute, there never has been misunderstanding so great — and there have been troubles and misunderstandings — that it was necessary that brother should rise against brother, and children deriving from the same mighty loins should imbrue their hands in each other's blood. And to me such a tragedy in the future is simply unthinkable.

Within the present century, within the last few years, a fear has arisen that another nation might have designs upon Canada. Should that possibility become a dread reality, and Canadians be forced to take arms in hand and fight that Canada should remain Canadian and remain British, I have a sure and confident hope that Canadians in the twentieth century will not be behind those of the nineteenth. The land where died Wolfe and Montcalm and Brock has produced their like; and they will not be found wanting. But if the valor of Canadians should upon the ultimate test prove futile and before them should be nothing but to surrender or to die in the last ditch, I have also a sure and abiding faith that the people of this mighty nation would not stand idly by and see their brethren slaughtered, or subdued. (Applause.) I know not whether the Monroe Doctrine extends to Canada; but, my American brethren, I do know that deep in the hearts of the American people is engraven that older, that dearer and more far-reaching doctrine, "Thus speaketh the Lord of Hosts, shew mercy and compassion every man to his brother." (Applause.) And in that last terrible hour, it is impossible that Boston could see Halifax, New York could see Montreal, these great lake cities of this State could see Toronto, Chicago see Winnipeg and the cities of the west see Vancouver and Victoria

pass under a foreign flag, a flag belonging to a nation different in descent, different in laws, different in institutions, different in aspirations and different in that indefinable something that we call the genius of a nation. (Applause.) As the United States are not to have Canada, by the great God in Heaven no other nation on the face of the earth shall have her. (Applause.) We shall remain Canadian and we shall remain British.

Forty years ago or thereabouts, when trouble arose over the Alabama matter, when the crisis was acute and war was terribly near, General Grant, one of your great Presidents, said that the presence of the British flag on the North American continent was a constant source of irritation. No doubt at that time there was much truth in what was said; no inconsiderable part of the people of the United States was descended from a race who had for generations suffered injustice at the hands of those who identified themselves with that flag. We have heard to-night "The Wearing of the Green" (a voice, "A great song"), yes, my friend, a great song, and a song, my friend, of a great people; and now a song whose tune is played by the regimental band on the 17th of March, to every Irish regiment in the British Army; and the Queen of Great Britain and Ireland sends to every Irishman in every Irish regiment, a shamrock on the 17th of March.

I do not wonder that many of the Irish loathed the British flag for years; but that has gone by. The Irish people are now finding who are their true friends and who are their enemies. They know whom they have to thank for the oppression of their race. The Irishman is becoming reconciled—he knows that the Englishman, the Scotsman, the Welshman, is trying to atone for the long centuries of misrule from which the Emerald Isle

has suffered. All discontent will die out when the Irishman has become reconciled to British rule. And this is almost secured, because he knows that in a short time he will have that Home Rule which Canadians have for years been urging for Ireland — a Canadian Home Rule, a Home Rule by which the Irishman may govern himself, in all matters affecting Ireland. Let me not be misunderstood — no man is a greater Imperialist than I, or stands more strongly for the union of the British Empire, and so I think it would be a world calamity if Ireland should for any reason or by any means be severed from the Empire — but a Home Rule on the Canadian model is what ninety per cent. of Canadians desire for her. And there is no more loyal British subject than the Canadian Irishman. And so between these two nations, yours and mine, the floating of the Union Jack is no longer like shaking a red flag before a bull; and instead of Canada being now an open sore — a stumbling block in the way of peace and harmony between these two nations, her ensign stirring up and irritating part of your people who formerly hated everything British — she is become a bond of union, bringing you more closely together. And this will increase in the future — for British in sentiment, British in institutions, British in law, British in government, we are American commercially, American socially, we are a link between the two nations; and I look forward to the time when Canada will join even more firmly the hands of her kinsmen together in a clasp never to be broken, forming a union of kindred nations never to be separated. (Applause.)

Now, it may be that the dream of the prophet is not doomed to be fulfilled, it may be that never will twin

fleets sail forth together under the Union Jack and the Stars and Stripes with the one mandate: "There shall be no more war." Indeed and indeed, if such a time come, then there will be no more war. But it may be that this is not to be; it may be that there never will be a treaty of paper and ink between the two great English-speaking nations; but it is as certain as the immutable laws of morals, as certain as the track of the planets around the sun, as the stars in their courses, that these peoples of kindred origin, kindred tongue, kindred institutions, kindred aspirations, must be bound together by a tie which is infinitely stronger than a parchment bond, that they must stand and march and, if need be, fight side by side for truth and justice and righteousness among the nations.

So mote it be. (Applause.)

“OURSELVES”

THE HON. MR. JUSTICE WILLIAM
RENWICK RIDDELL
of TORONTO (Kings Bench Div'n. H. C. J., Ont.)

In Response to the Toast at the

ANNUAL DINNER
OF THE
NEW YORK STATE BAR ASSOCIATION

SYRACUSE, N. Y., JANUARY 19, 20, 1911

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“OURSELVES”

Mr. Chairman, Fathers and Brethren upon the Bench, and my brethren of the Law Society of the State of New York — and you, ye goddesses (applause), who deign to glorify our masculine revels with the charm of beautiful and gracious womanhood,—

I venture to hope that there is something in a seat upon the Bench which is conducive to growth in grace and virtue. For at the last Bar Dinner which I had the pleasure of attending, I heard the learned Chief Justice of Ontario say that when he received an invitation to that dinner, he hesitated for some time whether he ought not rather to stay at home and write a judgment — or part of one — and that it was only after a struggle that he made up his mind to come out and “have a night with the boys.” I use the learned Chief Justice’s own terminology; and I daresay the members of this Bar Association will entirely appreciate what My Lord meant. Now, so far as I am concerned, when I received the invitation to attend this Bar dinner, I call your Secretary, Mr. Wadhams, to bear witness, that by the very next mail he received a letter saying that wild horses would not keep me away (laughter) — I was absolutely unable to observe the shadow of a shade of anything remotely resembling even the embryo of a struggle when I received an invitation to have a dinner with the boys. (Applause.) I venture to hope that it is only the learned Chief Justice’s longer years upon the Bench which enables him to rise to that height of virtue, and it was only my comparative youth upon the Bench which caused me to choose the primrose path and insist on being present once more with you. (Applause.) If not, I am

indeed in a parlous state. You all know the story of St. Augustine, doubtless — my friend, Mr. Kelly, who is more of a Patristic scholar than I, will correct me if I am wrong — but my recollection is that in his unregenerate days he was wont to pray, “O Lord, make me a better man, but not yet for a while.” (Laughter.) Or perhaps I might quote your own Abraham Lincoln — for it is said in the only lapse into poetry of which he was ever guilty, he produced this beautiful couplet:

“It is Abraham Lincoln holds this pen,
He will be good but God knows when.”

There is something, as the learned Chief Justice who spoke before me has said, of solidarity among lawyers which causes them to draw together, to associate one with the other — and you notice, I trust, that I still arrogate to myself the title of lawyer, although I know it would be very hard indeed to convince the members of my own Bar of the fact that I am still a lawyer. (Laughter.) Now, do not misunderstand me. I do not mean the whole Bar; because I know very well that whenever a judgment appears subscribed “William Renwick Riddell, J.” — you know that we Judges in Ontario do not hesitate to call ourselves J. — although I believe my brethren on the Bench of the State of New York rather apply that title to their colleagues (laughter) — however that may be, whenever a judgment appears subscribed in the manner I have mentioned, I know there is at least one and sometimes more members of the Bar of the Province of Ontario who are struck with the legal acumen I display, the knowledge of law, the ability to appreciate, to understand and to apply a really sound legal argument. I admit that there is an equal number, perhaps more, who shake their heads in sorrow that a man like *that* should have received His Majesty’s patent, a man who doesn’t know law when he sees it, and either can’t

or won't learn. Of course, you all know the alternatives a lawyer has when he has been "turned down"—I think that is the correct expression—when a lawyer has been "turned down" he has at least two alternatives, one of these is to appeal, the other is to go across to the tavern and take one or more drinks and damn the Judge. (Applause.) I think it was Congreve, the English poet, who said, "Hell hath no fury like to lawyers corned." (Laughter.) If that was ever true, its truth has not become less or stale by the lapse of time.

You will grant me, at least provisionally, the title of lawyer and let me proceed with my investigation.

We lawyers are members of a liberal and a learned profession. We are not mere handicraftsmen, base mechanicals—no doubt my friend, the Chancellor of the University, who is here, will expect me to use the Greek term, *Banauoi, cheirotechnai*—we are not mere bread and butter workers. Now, it is true that our profession does furnish us bread and butter, sometimes very little more; but while we do work for money, which is, indeed, sometimes cast up against us as a reproach, as a sin perhaps, certainly a weakness, I have not found anybody yet who does work, that does not work for money. Not very long ago I had the pleasure of addressing an audience of medical men—and, really, I want to tell you, to make the confession here, that you will find medical men fairly intelligent once you understand their terminology. (Laughter.) I was speaking to them about this very thing; and I ventured to say that the farmer is not wholly altruistic—the farmer does not till his soil simply for the benefit of the State. The shopkeeper would close his shop very quickly if his bills were not paid. Our friends on the Press have been known on occasion to bill their services at say

thirty-five cents a line; and the daughter of the clergyman who had received a call to another city at a larger salary, when asked whether her father was going to accept, said, "Well, father is in the library praying for guidance, but mother has started packing up." (Laughter.) And we are told about that "chieftain to the highlands bound" who cried:

"Boatman, do not tarry,
I will give you a silver pound
To row me o'er the ferry."

Then up and "spoke that Highland wight,
'I'll go, my chief, I'm ready,
It is not for your silver bright,
But for your winsome lady.'"

The poet being a Scotsman, and therefore truthful, does not tell you, does not deny that before the boat left the dock that silver pound was safely ensconced in the sailor's sporran. At all events, if the Highlandman did omit that trifling formality, he was quite different from his fellow countryman who was spoken of by "Punch" the other day. He was ferrying a number of passengers across the strait and a storm sprang up, and he said; "There is nae saying what may happen, sae Aw'll just tak' your fares noo." (Laughter.)

Now, it is true that we work for money, but that is the very least of our objects. Members of a liberal and a learned profession, our object and our desire is the search for truth of law and of fact — the vindication of the rights of the oppressed and the innocent, the punishment of the oppressor and the criminal, the advancement of what is just and right. The lawyer, too, when he accepts his client's retainer, forgets everything, except the laws of honor, which may conflict with his client's interest. The

weapon which he carries is the sword of the warrior and not the dagger of the assassin. (Applause.) But he must wield that sword in every manner in which an honorable warrior may or can. He is recruited not for sixty days, but is enlisted for the war. And is it not that very thing, that laboring and toiling for others while at the same time we labor and toil for ourselves, (— and is it not part of the general fitness of things that the more one labors and succeeds for his clients the more he labors and succeeds for himself?) — and is it, I say, not that very thing, that constant toil and that work and care for another which makes the lawyer the natural born leader of men? For it is common knowledge that that cause (speaking secularly), that cause is foredoomed to failure which is not headed by a lawyer. I noticed that a couple of months ago you selected as the executive head of your State a manufacturer instead of a lawyer; but I also noticed that as soon as he was sworn in, he immediately selected a private counsel — I take it to keep him straight. (Laughter.) It may be that that manufacturer will be equally effective — as effective as the lawyer almost certainly would have been. Now, it ill becomes an outsider, even although he is not an alien or a foreigner — and last year those of you who heard me, heard me repudiate the idea that I, a Canadian, speaking English, and under English law, was a foreigner or an alien in a country in which you speak English and in which the jurisprudence is based upon the English common law. (Applause.) If last year I was not an alien or a foreigner when I met you for the first time, how much less this time, when I am one of you? (Applause.) And I would say also that I am “one of the boys.” It would ill become me, however, being an outsider at least, to trespass upon your domestic affairs, rush in like a fool where angels might fear to tread. Any one who was tempted to do anything of the kind might

remember the story of little Robbie, ten years old, who was playing down at the corner of the street with the neighbor boys. His mother heard him saying something, and she said, "Robert, I never expected to hear you swear." "Why," he says, "mother, I wasn't swearing, I wasn't swearing at all, all I said was 'the devil'; and that isn't swearing." "Well," she says, "Robert, it may not be swearing, my boy, but it is certainly making light of sacred things." (Laughter.) I have some fear lest I might be thought to be making light of sacred things if I ventured to suggest that some at least of the votes which were switched — have I the correct terminology? (C. J. Andrews, "Yes.") — some of the votes which were switched to the manufacturer from the lawyer may have been inclined that way by reason of the fact that a not unknown supporter of the lawyer ventured to speak in language hitherto unknown to the ears of the people of this State, of the members of a dignified tribunal, of a tribunal which is known and admired and revered wherever the English language is spoken. (Applause.) And far beyond; for wherever law, the invention and gift of the gods, is revered as a science or respected as an art, the name of the Supreme Court of the United States is at the very apex of reverence. (Applause.)

The lawyer has ever been in the forefront of the fight for freedom, whether in France, or in England or the United States. We boast of freedom, you and I, and we say

"We must be free or die who speak the tongue
That Shakspeare spake, the faith and morals hold
That Milton held. Everything we are sprung
Of earth's first blood, have titles manifold;"

but that freedom which we enjoy is freedom under the law, and the law is in a large measure the work of lawyers —

and were it not for lawyers, law could never have been. When man first made his appearance in history, whether by evolution upwards, or devolution downwards — that I leave theologians and scientists to determine — he was little removed from the brute. As he developed and showed himself to be a social animal it was necessary that some rule should be laid down for his government. Obedience to that rule was right, disobedience was wrong, a sin. But two courses could be followed when one's rights were invaded. Either he might vindicate his rights by his own strong right arm, if he could — apply

The good old rule * * * *
 * * * * the simple plan
 That they should take who have the power
 And they should keep who can.

That is the state of anarchy, the state that is mentioned in the good old book, "In those days there was no king in Israel, but every man did that which was right in his own eyes." The other course was the submission of rights and wrongs to the arbitrament of a tribunal; and that tribunal, call it by what name you will, is a Court: and as Courts advanced and club law went down, so civilization advanced. And these reacted on each other because as civilization advanced so club law went down and Courts went up and Courts became stronger and stronger and stronger. The Court Baron gave way to the Royal Court, the Royal Court at Westminster — the power of the Baron ceased and the power of the Judge in the Court became greater; and a great operating cause in the elevation of the Court was the formation of a strong and independent Bar. Because history is the same wherever we look. When one speaks of Athens one remembers that Athens had probably the strongest Bar which ever existed.

In ancient Rome the jurisconsult was the man who made the law, and the Judge was but the temporary accident of the times. So in England from the time of the early Plantagenets a strong Bar began to be formed. That Bar gathered around the King's Court; and again action and reaction took place. The stronger the Bar the stronger the Bench, the greater the Bench necessarily the stronger the Bar.

And as time went on, then this nation came to be formed. The people of this nation drew, as they believed, the true principles of government from the English Constitution and from the Constitutions of other countries, ancient and modern, according as they believed these contained and set out the rules desired. They believed that they introduced the true methods of government, the true principles of legislation, of government, into the immortal Constitution of the United States; and in fact for the first time in the history of any nation and the only time in history so far of any nation, all the powers of the people, all the powers of the Legislature, all the powers of the Executive were submitted to the power of the Court; and that is one of the greatest glories even of this great and glorious nation. (Applause.) In Canada as in England we have no such constitutional limitations; but in Canada as in England and in every free country, the freedom we enjoy is freedom under the law, and what protects us is the power and strength of the Courts; and the Courts remain strong and powerful because they are backed by an independent, learned and able Bar. Thus, as time has gone by, as I have said, so the Courts have become more and more powerful.

You all know the story of the Boston streets. How some three centuries ago a calf walked through the pri-

meval wood, and wandering home, as good calves should, left behind a trail askew, a winding path, as all calves do, and then the next day a dog came along and he saw this trail ready made through the primeval wood and he followed the trail, and the next day came a bell wether with his flock following and they, of course, followed, and the cows and cattle and the horses came along, and the men walking saw the track ready made, and they followed the track. Then, when it came to make an ox-cart road, it made not much difference in a primeval wood like that where they chopped down the trees, and they chopped down the trees along that old calf's path, the calf by this time having become a mother, a grandmother and a great grandmother, and necessarily passed to her fathers — and into the stomachs of the Puritans. (Laughter.) Then a village is formed, and the village street follows the old ox road; and the town grows up and brick makes its appearance and the shops and the stores and the blacksmith shop and the church and the school-house are all built along the old calf path; and the city grows and at last becomes a city of, I hate to say how many hundred thousand inhabitants, for if I exaggerate it will hurt somebody's feelings, and if I make it too low there may be somebody here from Boston and I might never hear the end of it. In the long run we have a hundred thousand men every day led by that dead calf along that way, and they twist and turn and twist about and use language which I would not like to employ in the presence of ladies, and every day a hundred thousand men pass along and they lose a hundred years every day, and all on account of that calf that has been dead three hundred years.

It was thought that as in olden times trouble between subject and subject, and clan and clan, and nation and nation,

had to be decided by the strong right arm reinforced by a club, so in international matters it was thought that the old plan was the best plan after all, and until very recent times indeed nobody imagined for a single moment that trouble between nations should not be settled by the club. I don't care whether you have Gatling guns or whether you have swords; the sword is just an evolution from the old club, and the Gatling gun is just the modern counterpart of the stone that our ancestors used to throw at each other. But a better law has sprung up. Now we have gone further, people have come to the conclusion that the eternal principles of justice and right are just as binding upon nations, the members of the great confederacy of nations upon the earth, as they are upon single individuals, the members of a State; that right may not be determined by strength of armament and that no nation can expect to be an independent arbitrator in its own cause. Great Britain and the United States, since 1784 to 1910, have had treaty after treaty submitting this question and that to the independent arbitrament of independent tribunals. I have at another time, and before another audience, detailed the various treaties which have taken place between your country and mine. Nineteen separate questions have been referred, and in the case of all but five the reference has been triumphantly successful; and for one hundred years there has been no war between these two nations. For one hundred years, or nearly that, there has been no armed ship upon our Great Lakes. For more than one hundred years we have been using our common sense — for it all comes back to that — and there is not so much as an earthen fortification along the four thousand miles of our international boundary. (Applause.) We have in existence two treaties, one which governs all British territories, one which

is concerned with Canada alone, which provide for the submission of all questions in dispute to independent tribunals. I hope the door of this room is closed, I hope there is no reporter but our own—I know I can kill him if it be necessary—I am going to tell you a secret. Would you believe it? we two nations have been living together for over twenty years on a *modus vivendi* that everybody thought had gone by the board long ago; in 1888, when a treaty was signed by Bayard and Chamberlain, a *modus vivendi* was entered into between the contracting parties in the expectation that the Senate would confirm the treaty, but when the Senate failed to confirm the treaty, why, you and we just went along in the same way we had arranged for the *interim*, and for twenty-three years we have been living on that thing which is not agreed in writing or otherwise, but which depends upon our own plain common sense. (Applause.) The Senate of the United States may fail to approve of a treaty, but they cannot prevent you and me, your nation and my nation living together in amity and peace. (Applause.)

Another treaty is now on the boards that may be ratified. That may be more far-reaching even than those two treaties which now exist. If so, if it be successful, by whatever name it be known in history, it ought to have attached to it only two names, one a christian name and the other a family name, and these two names are Elihu Root. (Applause.) Because it is your President more than any other man, or any body of men, who is responsible, and ought to be thanked for that condition of affairs. (Applause.)

The lawyer is in power in England: the lawyer has at last attained his proper position at the head of affairs there. It is well that the lawyer is in control in Eng-

land. In Ottawa, the Premier of the Dominion and the leader of the opposition are both lawyers. In Washington the Executive, your President, is a lawyer of the very highest type. (Applause.) He has surrounded himself by lawyers of equal high class, one of whom you heard last evening and heard again this evening with the utmost delight. (Applause.) I may be quite wrong, but it seems to me that I can see the providence of God, the spirit of God brooding over this continent as that spirit brooded over the waters of the mighty deep before creation's dawn, when all was chaos, without form and void. I would not if I could, I could not if I would say one word in derogation of that very great American who was the opponent of William Howard Taft at the last election. William Jennings Bryan must be a man of great ability as well as an exceedingly lovable man or he could not have won the heartfelt devotion of hundreds of thousands of Americans whose heads are hard if their hearts are warm. (Applause.) Nor may we lawyers arrogate to ourselves all the political any more than all the moral virtues. This great nation bears in its heart the name of their mighty first President, the land surveyor of Virginia; and we in Canada will never forget the working operative stone mason, Alexander Mackenzie, our second Prime Minister. On this continent one does not break his birth's invidious bar simply because there is no birth's invidious bar to break; nor does one's past occupation prevent him attaining any position; and it might well have been that the editor of Lincoln would turn out to be one of your greatest presidents. But he had not been tried — there was nothing in his past from which one could judge how he would fill the great office of President of the United States. William Howard Taft had been tried in the fire, he had been weighed in the

balance and he had not been found wanting. (Applause.) The prudent, the independent district attorney, the able, erudite, careful Judge, the firm but sympathetic and kindly — oh, how kindly, millions of brown-faced brethren of the present age do know and of the future will know — the kindly Governor, the able, reliable Secretary, all gave bail for the honorable, firm, sympathetic, kindly, honest President. (Applause.) My brethren of the Bar Association of the State of New York, make no mistake — notwithstanding the jeer and gibe of the jester and the paragrapher that old adage still stands true, “An honest man is the noblest work of God.” (Applause.)

I, as a Canadian, say of William Howard Taft that he was the first of your Presidents who knew Canadians, who had lived amongst them, who appreciated them, who understood their instincts and understood the desires of their heart. He knew that Canadians were proud of their British origin and proud of their British institutions, and that they were determined, remaining British, to make their beautiful land, which, like yours, spreads from the Atlantic to the Pacific, to make that beautiful land the leading member of the British Empire. Knowing that, he never failed to say the kindly word to or for Canada. He never failed to do the kindly act towards or for Canada. He never failed to understand the Canadian's point of view; and when he found an opportunity — as he did not long after his inauguration — to do a kindly act by Canada he did not let that opportunity pass; and I am proud to say we upon our side have a man, the most picturesque and in my view one of the greatest men in British territory to-day, who is not behind William Howard Taft in his desire that your people and mine, my brethren, shall live together in peace and amity — Sir Wilfrid Laurier. (Applause.) When it was necessary that we should lower

our duties upon thirteen specified articles, among them perfumery, in order that there should be no war of tariff as between your country and mine, he said in his place in Parliament, under his responsibility as Prime Minister of the Dominion of Canada, "Not thirteen or three hundred articles, not all the perfumery in Canada or in the United States, or in the whole globe, can be aught but as the small dust of the balance compared with the friendship of the people of the United States."

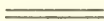
Mr. Taft, too, has made himself the apostle of peace, he has made that one of the great objects of his administration. (Applause.) Not a month ago, in Washington, my Canadian and British heart was rejoiced to see hanging upon the wall of a beautiful banqueting chamber there at a banquet at which the President of the United States was the honored guest, the American flag and the British flag of equal size, of the same material, of equal beauty, united with that most beautiful of all Latin words, "Pax." My heart rejoiced when I saw that; but that was nothing compared with the delight which must have filled the heart of every lover of peace when he read those magnificent words of the President of the United States, epoch-making words — I have heard in the British House of Commons, Gladstone deliver some of his most magnificent addresses, I have heard the great orators not only in the British House of Commons, but in our own — and we have orators — but there are no words which touched my heart, nor I believe the heart of every right thinking man more than these splendid words of President Taft: "There is no reason why there should not be submitted to judicial arbitrament every international question whether it refers to money, or territory or national honor." (Applause.) When the President of the United States can say that, and when the whole British House of Commons can unite with

him in saying it when these two great nations, the greatest and the wealthiest in the world, or that the world ever saw, when nations like these can say these words the day of peace is not far distant, nay, the day is already breaking in the east. And is that to be? Are these two nations which Carlyle says are not properly two nations, but one, inseparable by any human power or diplomacy, being already united by heaven's act of parliament and nature and practical intercourse — are these two nations above whom float flags which are red because dyed with the blood of a million heroes, these two nations whose history is a beadroll of fame, full of deeds of heroism and valor and patriotic self-sacrifice, two nations proud, self-reliant, with that chastity of honor which feels a stain like a wound, are these two nations to fling away the sword which they can both wield so well and say, "As for us and our house we will serve the Lord of Peace"? If so, the day of peace is not coming, but it has already come — and your place and mine, my brethren, in that is writ large. The day of the brute has gone, the day of the soldier is waning toward its close, the day of the lawyer is here when you and I see these two nations go forth together with peace in their right hand. That union will be grander and more glorious and more magnificent than even this Nation of States, great and grand and glorious and magnificent as it is: and we will cry, using the words of your own poet in larger and fuller and sweeter significance and signification:

"Sail on, O Ship of State!
 Sail on, O Union, strong and great!
 Humanity, with all its fears,
 With all the hopes of future years
 Is hanging breathless on thy fate.
 Our hearts, our hopes, are all with thee;
 Our hearts, our hopes, our prayers, our tears,
 Our faith triumphant o'er our fears
 Are all with thee — are all with thee!

O vision, blessed, beatific ! soon may it be realized in all its glory and grandeur and sweetness and grace : for in that realization you, my brethren, and you, my sisters, and we must at length and only then find Ourselves. (Applause.)

PRACTICE, CIVIL AND CRIMINAL,
IN ONTARIO



AN ADDRESS

BY

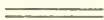
The HONORABLE

WILLIAM RENWICK RIDDELL, L. H. D., Etc.,
of TORONTO (Justice of the King's Bench Div'n, H. C. J., Ont.)

ANNUAL MEETING

OF THE

NEW YORK STATE BAR ASSOCIATION



NEW YORK, N. Y., JANUARY 20, 1912

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*Mr. President and Gentlemen, Brother Members of the
New York State Bar Association:*

It gives me a very great deal of pleasure indeed to meet you again. May I say, before attacking my subject, that I have been very much interested indeed in the discussion which has just been going on? It illustrates what I have so often said, that the time of the American lawyer is taken up more by constitutional questions in one day than the time of an Ontario lawyer is in a year. Because you know, if you use the word "Constitution" in the sense in which it is used in these United States, the Constitution of Canada may be described by a parody upon that famous chapter on the Snakes of Ireland. "There are no snakes in Ireland." (Laughter.) We have no Constitution in Canada in the sense in which you use the term. The Parliaments in our Dominion, like the Imperial Parliament in England, can within the ambit of their jurisdiction do anything which is not naturally impossible; indeed it is a maxim among our Canadian as among English lawyers that Parliament can do anything except make a man a woman, or a woman a man. (Laughter.)

When I read the announcement that I was to read a paper to this Association I was struck somewhat with terror — and I made up my mind I should at once throw myself upon the mercy of the court and confess immediately that I had no paper. That is due to more than one cause, possibly; in part, perhaps, to the fact that I have my own share of judicial temperament, which, of course, you know is defined by Mr. Dooley somewhat in these words. He says, "Hinnessy, I would like to be a Judge. I have the judicial temperament." Says Hinnessy, "What is the judicial temperament?" Says Dooley, "I don't like work." (Laughter.) But in justice to myself, I cannot say that is the only reason. (Laughter.) One

other reason is that we have still in Ontario an absurd superstition that a Justice of His Majesty's Bench ought to do at least some judicial work — occasionally. (Laughter.) I know it is suggested that some of my judicial brethren disregard that superstition to a very great extent — one of them, indeed, when he received Her Majesty's Warrant appointing him one of Her judges, immediately proceeded to sell his library and buy a new gun. (Laughter.) All of us do not have the courage that gentleman had, we are not so greatly daring, and consequently some of us, at least occasionally, do a little judicial work.

In the short time I was at home since I received the invitation to write a paper on this subject, I was exceedingly busy; and since I left home I have been in a continued series of intellectual debauchery in which there was no "morning after the night before" only because the night before extended into and, as it were, absorbed the morning after; and I have not had time to reduce anything to writing. But it may perhaps console you a little bit to know that some years ago I wrote for my friend, Dr. Lawson, the Dean of the Faculty of Law in the University of Missouri, a short article upon the Courts and the Practice in Ontario. I did not know until I came to this city, and indeed not until yesterday, that he had published it; but you will find some of it in the Forty-fourth Volume of the *American Law Review*, at page 597. If, however, you or your secretary desire I should write a paper so that it may appear upon your minutes, I shall be delighted to do so as soon as I get home and shake off that temperament which I find growing upon me as years go by, and get a little leisure so I can do so.

The courts in Ontario are all one court (speaking of the Superior Courts). Before 1881 we had two concur-

rent Law Courts and a Court of Chancery. In 1881, following the mother country — and the mother country following the State of New York, because of course the State of New York was the pioneer in that regard — we abolished all the courts then existing in the Province of Ontario, which were the two Common Law Courts, the Court of Chancery and a Court of Appeal; and made one general court, the Supreme Court of Judicature. That we divided in two branches, one the Court of Appeal and the other the High Court of Justice; and the High Court of Justice was divided into three branches or divisions. A fourth Division has since been added to the High Court. A judge can sit in any of these Divisions or in the Court of Appeal; any Judge of the Supreme Court of Judicature may to-day be trying a murder case and to-morrow be sitting in the Court of Appeal or Divisional Court; but as a rule the High Court Judge remains in the High Court and does not sit in the Court of Appeal — although he may do so when called upon by the Chief Justice. In our practice there is no distinction between law and equity, and everything is tried in the same court; where the rules of equity and the rules of law do not agree, the rules of equity prevail — we have abolished (following the mother country) the distinction between law and equity in that regard. With the exception of a few cases, few comparatively in number, although of great importance sometimes, every matter which is brought before the Court is brought by Writ. If you want a will interpreted, or anything of that kind where there are no facts to be determined, then you may bring it before the Court by an originating summons or notice of motion. Sometimes counsel get together and state a case and that may be heard before the Court, without Writ. Feigned issues are not allowed with us; neither is there any compulsory submission to arbitration.

Outside of such cases as I have mentioned, everything is begun by a writ, and that is so whether it be for damages for slander or upon a promissory note or on a mortgage — whatever anybody wants to sue for is sued for by way of a writ. In this writ the cause of action is set out in the most general terms. The writ is served on a corporation by serving an officer of the corporation, on a lunatic by serving the lunatic or his committee or the person in whose charge he is. It may be served on a married woman; because there is no distinction between married women and other women in that regard in Ontario. On the service of the writ, the defendant is given ten days to appear. One may specially appear simply to dispute the amount of damages. If that is done, then it is referred to a master at once to determine the amount of damages without further pleading. If there be a general appearance, the practice is different. Some writs may be endorsed specially, as we call it, that is practically what you might call liquidated claims set out on the writ. If an appearance be entered to a specially endorsed writ, an application may be made by the plaintiff, if so advised, to the Master to strike out the appearance and cause judgment to be entered if he can show that there is no defense. That can be shown by affidavit on the part of the plaintiff himself. If the defendant does not answer that, judgment goes against him. He may answer by affidavit, he may be examined under oath before a master on his affidavit, and if it appears there is really no question at all to be tried, and the appearance is simply for the purpose of delay, the appearance is stricken out and judgment entered. If there is a plausible case to be tried, the Courts do not cause the appearance to be struck out. A statement of claim is delivered by the plaintiff, the statement of claim corresponding to the old bill of complaint in equity or to the

declaration in the common-law courts. The statement of claim, according to our rules, must set out facts, not conclusions of law. All the facts upon which the plaintiff desires to base any claim must be set out and the statement of claim is divided up into paragraphs for convenience. Now, it may be that the statement of claim does not disclose any cause of action. Demurrers in form are abolished; but we have demurrers in substance. Application may be made to the Court to strike out the statement of claim as disclosing no cause of action; and if that appear, judgment will be entered for defendant by the Court, unless the plaintiff is in position to amend. After the statement of claim has been delivered and is not demurrable, using the old expression, *i. e.*, it cannot be struck out, the defendant may not be able to answer, may not be in a position to understand precisely what the plaintiff's claim is, and he may demand particulars. If particulars are not furnished he may have particulars ordered by the Master or Judge. Then he serves and files a statement of defense. The statement of defense must set out also the facts on which the defendant relies for a defense. I am sorry to say — perhaps I ought not to say that I am sorry, because I am one of those who have, collectively, a right to change it if thought fit — I am sorry to say that in our practice where an allegation in the statement of claim is not specifically admitted it is taken to be denied. I think very much better is the English practice in which every allegation in the statement of claim is taken as true unless it be specifically denied.

Again, suppose the statement of defense sets up no real defense to the action, a motion may be made by the plaintiff to strike out the defense and have judgment in precisely the same way as the defendant had a right to move to strike out the plaintiff's statement of claim. As

soon as the statement of defense is in, either party has a right to serve what is called an "Order to Produce," directing the opposite party to produce on oath, all documents, copies of documents, etc., etc., which he has or has had in his possession bearing on the issue to be tried. Then either party may be examined under oath by the other generally upon the whole case. If a corporation be one of the parties to the action, an officer of the corporation is selected by the opponent, who may be examined.

Now, there is a great deal of difference of opinion as to the value of this "examination for discovery" as we call it. In practically every case in Ontario there is an examination for discovery. That increases the cost of the action undoubtedly. I heard the other day, very much to my astonishment, at a meeting of the Ontario Bar Association which I attended before I had the pleasure of meeting you here, one very eminent member of the Bar say that an examination for discovery was absolutely useless except to show the opposite side what one's case was. In my own experience, I did not find this to be the case. My experience (and I know the experience of a great many others practicing at the Bar is the same) was that the "examination for discovery" is an exceedingly valuable proceeding. When you examine the other side for discovery you find out what his case is. It is true you must disclose, to a certain extent, your own case; but that is not always of much importance. I have found that the examination for discovery leads to the settlement of at least one-third and perhaps more of the cases which would otherwise be tried, and I have found it exceedingly valuable. But opinions differ in that regard.

In a great many instances the plaintiff also requires to make application to the Master in order to have particulars delivered. Particulars may be required to be deliv-

ered of the statement of the defense, that is what particular matters the defendant relies on for his defense. When delivering a statement of defense, the defendant may counterclaim for any claim he has against the plaintiff on any cause of action. In an action brought on a promissory note a counterclaim may be brought of a claim for libel — with this provision, however, that if the Court sees that the issues should not be tried together the Court may strike out the counterclaim, or order it to be tried at a different time from the general action.

Then we come down to the trial. We have the jury system the same as you, but I do not think we are quite so — I shall not say crazy, I know better than to say that to lawyers — but we are not so *wedded* (that is a good word) to the jury system as you are. There are certain cases such as malicious prosecution, libel, slander, actions of that character which are tried by a jury unless both parties agree that they be tried by the Judge. In most instances they are tried by the jury — I mean, false imprisonment and that sort of thing. Equitable issues which before the Judicature Act of 1881 were tried in the Court of Chancery, are tried by the Judge alone, unless the Judge directs them to be tried by the jury. It may sometimes happen — I dare say it happens in the experience of every lawyer — that an equitable issue, an issue that is really equitable, comes up and after all it turns out to be a pure question of fact, it turns out that the case will depend upon the determination of a question of fact, and that perhaps upon the credibility of two witnesses; and a Judge sometimes likes to cast the responsibility upon a jury and let a jury find out which one of those two men is lying, if not both of them. Accordingly the Judge has the power to direct even an equitable issue to be tried by a jury.

Outside of these I have already spoken of every issue in our High Court of Justice, or in our County Courts, may be tried by a Judge if he sees fit. If either party to an action desires a case to be tried by a jury rather than by a Judge, he files what is called a jury notice. If no jury notice is filed the case goes on the non-jury list and is tried without a jury unless a Judge sees fit to transfer it to the jury list. If a jury notice be served, the case goes on the jury list, and when it comes down for trial the Judge may say, "I will try this case myself," and there is no appeal from that. The Judge is absolute master of the situation. Sometimes a plaintiff or defendant asks that the jury notice be dispensed with and the case tried without a jury. Sometimes both of them agree it should not be tried with a jury, sometimes they have agreed it ought to be tried by a jury; but whatever they may say, the Judges have it in their own power to try a case without a jury; in a very great majority of cases the cases are tried without a jury except those particular cases I have mentioned, and added to that, accident cases, which are becoming more and more frequent.

The old French system, the Canadian system before 1759, was to try all issues without a jury and by Judges alone. When Canada was conquered in 1759 by the British, and particularly in 1763 when the Royal Proclamation was issued, the English law was introduced and juries were introduced also. The French Canadians could not understand how the Englishmen would sooner have their property rights determined by the agency of tailors and shoemakers than by Judges. That same idea is still prevalent in Lower Canada, Quebec; and it is becoming more and more prevalent in the Province of Ontario, and we are trying fewer and fewer cases by juries every day. If a case is tried by a jury ten are required to agree in

order to find a verdict. If a jury should not agree, the Judge may discharge them and either put the case over or call another jury. I follow either practice, according as it seems to me more convenient. Sometimes when a case has taken a long time and other litigants have been waiting with their witnesses, it does not seem fair to give these people whose jury have disagreed another chance at the expense of those who have been waiting. Sometimes it seems to be absurd to postpone to a future assize a case which ought to be tried forthwith, and we call a new jury; or what is more likely to be the case, we discharge the jury and try it then and there and thus dispose of it.

If the jury finds a verdict, the Judge has no power to award a new trial. There must be an appeal.

An appeal may be taken to the Divisional Court of the High Court of Justice. The Divisional Court consists of three Judges. We have four Divisional Courts, and any member of any Divisional Court may sit in any Divisional Court. When counsel, as they sometimes do, skirmish for Judges -- I suppose that is entirely unknown in your practice, -- but it is said that in Ontario they do, and they postpone their cases not uncommonly, it is said, on account of the absence of necessary and material Judges. (Laughter.) Now, I am glad that excites your amusement, because it proves to me you cannot have anything of that kind in your practice -- when counsel have skirmished for Judges, very often they find that very Judge whom they are anxious to avoid sitting up in the Divisional Court smiling at them. The grounds of appeal to the Divisional Court are very much as in your appeals here, verdict against evidence, against the weight of evidence, surprise, absence of witnesses, exclusion of evidence and admission of evidence, and all that sort of thing. We do not have very much bother about admis-

sion or rejection of evidence in our Courts; unless we can see that the exclusion of evidence or the admission of evidence has led to some injustice, then we pass it by. Matters of law as a rule are the determining matters in the Appellate Court; although there are occasionally cases in which appeals succeed upon the ground of the non-admission of evidence, or the admission of evidence which ought not to have been admitted. If a case is tried before a Judge, and he has improperly rejected evidence — and I may say that this is the rarest of all contingencies, because as a rule we admit the evidence subject to objection, and then we never allow it to influence our mind, of course — if a Judge has refused the evidence improperly, the Divisional Court as a rule does not send the case back for a new trial, but the Court often says, "We will sit on such a day, you can bring the evidence you desired the Judge to hear and we will hear it here." We hear the evidence and determine the case then and there, without sending it back with all the risk, expense, inconvenience, annoyance and trouble of a new trial. (Applause.) If there is a row about the pleadings — because even yet we have some people who talk about pleadings, though pleadings are pretty nearly defunct in our Courts, we know them by name and know them by sight, but we pay very little attention to them — if there is any row about the pleadings we say, "Very well, we will amend the pleadings." If a lawyer says, "If that amendment had been made in the Court below, we should have had other evidence," we may say, "Very well, what day will suit you? We shall hear your witnesses." One of our substantial rules and one of the rules more beneficial than perhaps fifty of the other rules is this, all amendments are to be made which are necessary in order that judgment shall be given according to the very right and justice of the case. (Applause.) No case in Ontario

fails from defect of form—that is one of our rules. Again, no disregard of forms laid down, or disregard of the time under which certain proceedings should be taken, no disregard of terminology, according to our practice, bars a man who has a right, of his right. Disregard of form does not nullify the proceedings.

Then if the Divisional Court is thought by either party to have made a mistake, there is an appeal to the Court of Appeal composed of five Judges. Those appeals are heard by the full Court of five Judges, but are not very common. The more common practice is to appeal from the trial Judge direct to the Court of Appeal, skipping the Divisional Court; and those are not so very common either. These appeals from the trial Judge to the Court of Appeal direct may be heard by three Judges of the Court of Appeal or all the five. I will read you from the article which I wrote some years ago of the appeals in 1908. "In 1908, 1,153 cases were tried by the High Court, 180 of these were appealed to the Divisional Court and 130 dismissed, 37 allowed, 10 varied and 2 still undisposed of. The appeals direct from trial to the Court of Appeal were 62; 28 were dismissed, 14 allowed, 8 varied, 12 remained undisposed of." Because even at that late date people tried to settle their cases.

All appeals from the County Court, which has jurisdiction up to six or eight hundred dollars, come to the Divisional Court, as appeals from the High Court of Justice comes to the Divisional Court. County Court Judges are members of our Bar of ten years' standing. They are appointed by the Dominion Administration for life. The practice is precisely the same as in the High Court. Of all the cases in the Divisional Court, 544 in all, including the 180 from trials, only 43 appeals to the Court of Appeal, of which 23 were dismissed, 11 allowed,

3 varied. The above figures are derived from the report of the Inspector of Legal Offices. From the Court of Appeal to the Supreme Court at Ottawa in 1908 are reported in the Supreme Court Reports, 9 cases, 7 dismissed, 2 allowed (there maybe, no doubt are, some cases not reported, but very few).

From the Court of Appeal, important cases may be taken to the Supreme Court of Canada. Rarely is there an appeal from the Divisional Court to the Court of Appeal; still rarer is there an appeal from the Court of Appeal to the Supreme Court of Canada, which is an entirely different Court. If you practice in Canada you had better have your pleadings in proper shape before you get to the Supreme Court of Canada because that being a different Court, it takes the pleadings as brought to it from the inferior Court. From the Court of Appeal to the Supreme Court at Ottawa in 1908 there were reported in the Supreme Court Reports nine cases, seven dismissed, two allowed. In very rare cases there are also appeals from our Court of Appeal which are taken across the Atlantic instead of going to the Supreme Court of Canada — and particularly in constitutional cases (because I am going to withdraw what I said about the Constitution a minute or two ago) — an appeal is taken to the Judicial Committee of the Privy Council in Downing street, Westminster. We have a kind of constitution (although we do not call it that) by the British North America Act. The subjects of legislation are divided between the provinces and the Dominion, and sometimes we have disputes as to whether the Dominion has the right to pass legislation upon a particular subject, or whether the province has a right to pass legislation upon that particular subject; we do not, however, generally talk about “constitutional” and “unconstitutional,” but we use the terminology “*ultra vires*” and

"*intra vires*." Occasionally and, as I have said, particularly where a question of *ultra vires* is concerned, an appeal is taken to the Privy Council. I have given an account of the Privy Council in an address to the Missouri Bar Association, printed in 44 *American Law Review*, page 161. In the Privy Council in 1908 are reported six appeals from the Court of Appeal, of which five were allowed and one dismissed; there was also an appeal from the Supreme Court in an Ontario case which was allowed. From issue of the writ of summons to the final disposition by the Privy Council there is no need for two years to elapse. So much for the civil practice.

On the criminal side the story is somewhat historical. When Canada was conquered in 1759 the French law was universal; it was of course based upon the Roman law, the Civil Law. As soon as the British conquered Canada, the English criminal law was introduced and the English criminal law has continued from that time to the present. The criminal law is under the jurisdiction not of the provinces, but of the Dominion Parliament composed of members from all the provinces. It is true that Provincial Legislatures have power to make certain quasi criminal offenses — for example, the watering of milk and that sort of thing which are quasi civil and quasi criminal — those are within the jurisdiction of the province, although the Dominion may make anything a crime. The other day I said to a lawyer who was arguing to me about a certain matter being *ultra vires*, "If the Dominion Parliament saw fit they could make it a crime punishable by capital punishment for a man to chew tobacco." The Dominion has power to make anything a crime; it has absolute jurisdiction over criminal law and criminal procedure; but not over the constitution of Courts of criminal jurisdiction. The Courts of criminal jurisdiction are constituted by the

provinces; so that (speaking generally) the same Court which tries civil cases is the Court which tries criminal cases.

Before 1892 we had the English criminal law as modified by the statutes of the provinces before Confederation and by the Parliament of Canada after Confederation; but in 1892 Sir John Thompson, the then Prime Minister, having been a Judge himself in Nova Scotia, saw the propriety of codifying the criminal law and accordingly, with the assistance of able lawyers in the Houses of Parliament on both sides of politics, he in 1892 drew up a code of the criminal law. The Judicature Act of 1881 very nearly proved the death of some of the old equity men and common law men also in the Province of Ontario; but that was nothing to the dismay which spread in the ranks of the lawyers who practiced in the criminal Courts, when the Code of 1892 was passed. The distinction between felonies and misdemeanors was abolished. Every crime was made an indictable offense. All the beautiful little pitfalls and holes that old criminal lawyers used to know so well about in indictments, etc., are filled up and done away with. Parliament provided that the indictment might be in the simplest form, so long as it set out and explained to the alleged criminal what it was he was charged with. If the indictment used the words of the statute that was enough. For instance, an indictment for murder is never more than three lines long, and it would read like this, "The jury for our Lord the King present that John Smith on the 7th of September, 1911, at the City of Toronto, murdered Tom Jones." That is all there is about it. There are no pitfalls in the criminal law.

If a person is charged with a crime, an investigation is made by a magistrate, sometimes by a coroner. Under the old practice, of course, the finding at the coroner's

inquest could be laid before a petit jury. That is no longer our law. Everything of a criminal nature which is to be tried by the High Court comes before a grand jury. The accused first comes before a Magistrate; he has the right to have his full defense gone into, witnesses called and examined; and if at the conclusion the Magistrate thinks there is no case, he is dismissed — although the prosecutor may demand to be bound over to prosecute, in which case he comes before the next Court of competent jurisdiction. If the Magistrate thinks a case has been made out, he commits for trial.

Save in the case of treason, murder and a few others, within twenty-four hours of a person being committed to jail he must be brought before the County Court Judge. The County Court Judge is a Judge of inferior jurisdiction, but he must have been a barrister for ten years before his appointment and ought to know as much law as a High Court Justice — and many of them do. Upon being brought before the County Court Judge, the alleged criminal is told in simple language with what he is charged. He is told, "Now, you have a right to be tried by a jury before the next Court of competent jurisdiction" (mentioning the Court, when it is to be held, etc., so that the prisoner will know), "or you may be tried by me forthwith without a jury." In nine cases out of ten the innocent man, and in quite a number of cases the guilty man, thinks he might just as well take his chances with a Judge as with a jury; and so he is tried by the Judge. A simple form of charge is drawn up, and the Judge tries him; that is all there is to it. So you see, this practice of "Speedy Trials" as we call it, relieves the High Court of Justice of nearly all the criminal cases with the exception of murder and a few others. We have not had treason for some years in Canada and we are not likely to have

another crop for some time. If, however, the accused elects to be tried by a jury, the case is brought before a grand jury (in Ontario of thirteen). Seven may find a bill. The bill is drawn up in the form I have described.

The trial is before a jury of twelve; they must be unanimous either one way or the other. If a jury cannot agree I almost always discharge them and call another, right there and then, and get done with it. Some Judges prefer rather to postpone the case to the next assize and in the meantime commit the man to jail or let him out on bail. If a mistake is made at the trial, or a lawyer thinks a mistake is made in the trial — these are not quite synonymous expressions, you know — if it is supposed (that is better) (laughter) that a mistake has been made during the trial on questions of law, the lawyer may ask the Judge to reserve the case for the Court of Appeal upon that question of law, or the Judge may do it upon his own motion without being requested to do so. The Judge may refuse; that refusal is subject to appeal. If he has granted the case, that goes to the Court of Appeal, and the Court of Appeal of five Judges determines that question of law and whether the Judge was right. In most cases I am glad to say it has been found he was right, and so the appeal goes by the board. There is a provision in our Code which has never so far as I know been called upon; and that is this: in case the conviction be affirmed by the Court of Appeal by a divided Court there is an appeal to the Supreme Court of Canada. That has never yet so far as I know been called into practice: our Court of Appeal have always been unanimous.

This is the simple, every-day practice which has been found very advantageous and beneficial. I have never in all my thirty years's experience at the Ontario Bar and on the Bench taken more than thirty minutes to find a jury,

even in a murder case. I have never yet — and I have defended lots of them and I have hanged quite a number; I do not mean that I did it with my own hands — I trust that I should not hesitate to do it if it were my duty; greater men than I have been charged with having exercised that function — none of the men that I defended got hanged I am thankful to say, though there are two or three in Kingston penitentiary to welcome me when I chance to go there (laughter) — I have never yet in all my experience (except in one case) seen it take as much as four days to try a murder case. In murder cases before me I have never been more than a day and a quarter, and in most cases less than a day. We allow five expert witnesses on each side and that is all. An expert witness unless he has examined the prisoner himself is, of course, simply going to give opinion evidence. We bring him in Court to listen to the evidence. If he requests it he may take the man and examine him and then give an opinion. We do not have six or eight pages of a hypothetical question. The expert is asked simple, particularized questions. Our insanity law is simple. I see that my judgment was affirmed by the Court of Appeal since I came to this city in a case where a man was charged with murder. The man waited for another on the street and shot him. The first doctor for the defense was called and was asked, "Was this man insane?" "Yes, insane." "In what form?" "An incurable form of insanity, paranoia in an advanced stage." "Did he know the nature and quality of his act?" "Certainly." "Did he know that what he was doing was wrong?" "What do you mean by wrong?" says the doctor. I said, "Wrong in the sense of being against the law." He says, "Yes, undoubtedly." "What then was his mental condition?" "He knew what he was doing, he knew it was against the law, but he

had an irresistible impulse to do that act, his power of inhibition was gone and he could not help shooting the man." The other doctors agreed. I charged the jury, "If you believe what these doctors say, or rather unless on your oath you think you know better than these doctors, then it is your duty to find a verdict of guilty. We are an iron people and we have an iron law. We must enforce the law as we find it. You have no more right to change the law than I have, and I have no more right to change the law than your minister has a right to take the word 'not' out of some of the commandments and tell you to obey the commandment as so amended — to go and lie, steal and murder. Our law is, if a man, however insane he may be, knows what he is doing and knows that that is against the law, it makes no difference that he is insane — he must not be found not guilty on the ground of insanity. Our law says to a man who alleges he has an irresistible impulse, 'I shall hang a rope up in front of your nose and see if that won't help you some.'" (Applause.) We are not troubled much with expert witnesses. (Laughter.) If an expert witness attempts to give an opinion as to what ought to be done with the accused, he is checked — that is none of his business, it is not for him or for me, it is for the Executive to say.

Our civil practice we have found very convenient, very speedy. Please do not imagine I am up here to boast about my own country or find fault with any other — but we have found our civil practice very speedy, and a man can have his case tried just about as soon as he wants to. In ninety-nine cases out of a hundred the delays are due either to the client or to lawyers who do not want to have the case tried. They are skirmishing for a settlement or looking out for something else. There is no reason why a case should not be tried within six months of the writ or less. The first

case that ever came before me for determination that went to the Privy Council, I heard in April, and in June of the following year it had gone through all the Canadian Courts, and had been finally determined by the Privy Council. There is no reason why any case should not be concluded in our country in less than eighteen months. There is no reason why a man who has met with an accident should not have his case tried anywhere throughout the country in less than six months. The practice, as I have said, we have found convenient.

There are two ideas which are the basis of the practice of law in different countries: one is that the Courts are a sort of umpire sitting up on the watch to see that the two men fight out this dispute according to the rules of the game. It is not a matter of very great importance whether a man gets his rights or not, but it is a matter of enormous importance that the smarter man should get a verdict. That is the old idea. The other idea is that a man should get his rights even although the record gets in a shocking state. You remember when they talked about the English Common Law Procedure Act, Baron Parke said, "Think of the state of the record." Record I suppose I ought to call it on this continent, "Think of the state of the record." That was the old idea. The learned Baron suffered greatly. It is fair to say he had a new lease of life when he moved in the House of Lords as Lord Wensleydale.

You will, no doubt, remember Sir William Erle, when Baron Parke said, "My monument is to be found in the sixteen volumes of Meeson and Welsby," replying, "Parke, if there had been seventeen, the people of England would have risen up and wiped out the Courts entirely." (Wise's Index had not then been published, and so the Courts escaped extinction.)

The other theory is that Courts are instituted to do justice between man and man, to see that every one gets his rights irrespective of the way in which his lawyer asks for them. Accordingly, the present practice which we try to follow — and our rules are laid down specifically in that view — is to get out what the facts are and if the pleadings do not enable the parties to prove or rely upon these facts, amend the pleadings. If one party is inconvenienced or put to disadvantage, make him who has made the mistake pay the costs. Amend your pleadings, get out all the facts that bear on the issue and determine the matter according to the very rights and merits of the case. It is the client, after all, who has to pay the shot, and it is the client that should be considered, what harm if the record does get a jolt now and then.

I know too many lawyers, and perhaps too many Judges, look upon the client as a simple Scotsman looked upon his wife. Donald met Sandy one day and said to him, "Sandy, ye're lookin' verra glum." "Aye," said Sandy, "ma wife's deid." "Oh, man, an' hoo did that happen?" "Weel, ye see," said Sandy, "about a week ago, I was waukened up i' the middle o' the nicht be the woman grainin' unco' grievous — an' I says to her, 'What's wrang wi' ye, woman?' and she said, 'Man, but I'm verra seek, wull ye no gang for the doctor?' and I said, 'I canna gang for the doctor in the middle o' the nicht.' But she lay there grainin' sae bad that I could na' sleep, and I happened to think o' some pooders the doctor had left for me the day afore; and sae I got up an' lookit at the directions, an' it said, 'Take ane every three hours,' an' I thoct she was that bad that I had better gie her eneeugh — sae I gied her three at ance, an' in half an hour she was deid, stane cauld, an' I had to gang for the doctor in the middle o' the nicht after a'. Weel, I buried her, an' I'm unco' lonely, for while she had her

faul'ts like a' folk, she was a guid wife, tak' her a' thegither ; but was it no' God's mercy I didna tak' thae pooders mysel' ? " (Laughter.)

In the theory of law we first mentioned the lawyer may have the misfortune and mortification of losing a righteous cause by technicality ; but it's God's mercy that he is not personally ruined or deprived of his rights. That is the part of the unhappy client.

Now, gentlemen, if you really desire and so express a desire through your Secretary, that I should write you something on our practice I shall be glad to do so. Perhaps what I have said will be sufficient. I thank you. (Applause.)

THE COURTS OF ONTARIO

PAPER PREPARED

BY

THE HONORABLE

WILLIAM RENWICK RIDDELL, L. H. D., Etc.,
of TORONTO (Justice of the King's Bench Div'n, H. C. J., Ont.)

FOR THE

ANNUAL MEETING

OF THE

NEW YORK STATE BAR ASSOCIATION



NEW YORK, N. Y., JANUARY 20, 1912

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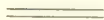
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THE COURTS OF ONTARIO

This paper deals in succession with (1) The Profession, (2) The Courts, (3) The Judges, (4) The Civil Practice, (5) Costs, (6) The Volume of Appellate Business, and (7) Criminal Procedure.

1. *The Profession*.—There are two classes of practitioners, Barristers and Solicitors. A lawyer must belong to one; most belong to both. The Barrister alone can conduct a case at trial; the Solicitor alone files pleadings. Barristers are formed into a body—the Law Society of Upper Canada—now nearly a century old; every five years they vote by ballot for thirty benchers, who with certain ex-officio members form the governing body, or bench. Collectively, the benchers form convocation; they fix the standards of education, conduct examinations, etc., and call to the Bar. It is necessary for the candidate for call to have been an admitted student of law for five years, or for three years if a B. A. or LL. B. in some recognized university. After being called by convocation the young Barrister is presented by a bencher to the Court; he is then sworn, and thereafter he has the right of audience. The Court does not call to the Bar, and has nothing to do with the curriculum or examination. Barristers are of two classes—King's Counsel and Stuff-gownsmen—the former are appointed by the administration of the Province from amongst the members of the Bar; they wear a silk gown and sit “within the Bar,” thereby having the privilege of pre-audience in the Courts other than Trial Courts. Otherwise, the title is almost entirely honorary. Convo-

cation also fixes the education, etc., of Solicitors; and upon examining them, grants a certificate of fitness. The same requirements as to time of service as an article clerk are imposed as in the case of a Barrister. Upon the certificate of fitness being presented to a Judge of the High Court, he grants a fiat for admission of the candidate as Solicitor, and the oath is administered before the Judge. Thereafter the new Solicitor may practice in all the Courts. Each Barrister and Solicitor pays a fixed sum to the Law Society and receives the official law reports.

2. *The Courts.*—The Court of King's Bench was established in Upper Canada in 1794 by Provincial Statute,¹ with power to hold pleas in all manner of actions, causes or suits as well criminal as civil, real, personal and mixed, in Upper Canada. This Court of course became the Queen's Bench on the accession of Queen Victoria. In 1837² a Court of Chancery was established, presided over by the Vice-Chancellor of Upper Canada; and in 1849³ another common-law Court, the Court of Common Pleas, with the same jurisdiction and practice as the Court of Queen's Bench. At the same time the Court of Chancery was reconstituted with a Chancellor and two Vice-Chancellors.⁴ These three Courts continued side by side as the Superior Courts of original jurisdiction until 1881. By the Act of 1794⁵ the Lieutenant-Governor of the Province with two or more of his Executive Council constituted a Court of Appeal from the King's Bench, and the same Court became the Court of Appeal from Chancery in 1837, but in 1849 this Court of Appeal was abolished and a new Court of Error and Appeal was constituted to hear appeals from both the common-law Courts and the Court of Chancery. This

new Court was much like the Court of Exchequer Chamber in England and consisted of all the Judges of the three Courts of first instance. In 1874⁶ this Court was reconstituted and thereafter consisted of Judges permanently of the Court of Appeal. In 1881⁷ the former system was abolished; all the Courts, Appeal, Queen's Bench, Chancery and Common Pleas, were united and consolidated into one Supreme Court of Judicature for Ontario, composed of two permanent divisions — [1] the Court of Appeal for Ontario [this has five Judges] and [2] the High Court of Justice for Ontario; and of this High Court of Justice there were the three divisions, *i. e.*, the Queen's Bench, Chancery and Common Pleas divisions. Recently another division has been added in the High Court, *viz.*: The Exchequer Division. Each of these divisions of the High Court of Justice has three Judges. Then there are inferior courts of limited jurisdiction, County Courts, Division Courts and Surrogate Courts in each county or union of counties.

3. *The Judges.*—Judges of the Supreme Court of Judicature and of the County Courts [these last preside also in the Division Courts] must be Barristers of ten years' standing — they are appointed by the Crown — the Dominion authorities — and for life. No layman has civil jurisdiction in Ontario. Small debts, etc., are sued in the Division Courts, presided over by the County Court Judge. The justice of the peace has criminal jurisdiction only, *i. e.*, to investigate alleged cases of crime, etc.

4. *The Practice [Civil].*—In the lowest Court, the Division Court, the forms are of the simplest character, and pleading in any proper sense there is not. In the High Court and County Courts the keynote is to be found in two of the Consolidated Rules: "The Court or a Judge may at any time amend any defect or error in any

⁶37 Vic., C. 7.

⁷44 Vic., C. 5.

proceedings; and all such amendments may be made as are necessary for the advancement of justice, determining the real matter in dispute and best calculated to secure the giving of judgment according to the very right and justice of the case." "The Court or a Judge may enlarge or abridge the time appointed by these rules or any rules relating to time or fixed by any order for doing any act or taking any proceeding upon such terms as may seem just; and such enlargement may be ordered although the application is not made until after the expiration of the time appointed or allowed." In the High Court and the County Court all actions and suits are begun by writ of summons, indorsed with the cause of action — the defendant has ten days to appear by filing a formal appearance. If he does not then judgment may be entered, final or interlocutory, as the case may be, according as the claim is such as permits a special endorsement [*c. g.*, a promissory note, etc.] or not. If interlocutory, and a question of damages is involved, then the case goes to trial for assessment — in the case of other claims, *c. g.*, upon a mortgage, other provisions are made. Upon appearance, unless the defendant waives the right to a statement of claim, the plaintiff files and serves a statement of the facts which he alleges and upon which he bases his right of action — this must be done within three months of appearance, if not, the defendant may move to dismiss the action. If a statement of claim is served, the defendant has eight days to file and serve his defence. He may with his defence set up any claim he has against the plaintiff — the plaintiff replies if so advised. When the pleadings are closed, a notice of trial may be given at least ten days before the day of trial. The parties are entitled before the trial to have produced under oath by their opponent all documents and copies of documents bearing upon the causes of action; and also

to examine under oath the opposite party before a Master or Special Examiner. Certain actions, such as libel, crim. con., etc., must be tried by a jury unless both parties waive the right to a jury; certain others, which are purely equitable, by a Judge, unless the Judge otherwise orders. In all other kinds of actions if either party desires a jury he files and serves a jury notice, but the Judge at the trial may in his discretion try any such case without a jury upon or without the application of either party. The civil jury is twelve in number, ten may find a verdict. In many cases, indeed in most cases except those of the simplest character, the trial judge instead of taking a general verdict requires the jury to answer questions of fact submitted to them and upon these answers directs the judgment to be entered according to his own view of the law. The jury agreeing, the trial judge cannot grant a new trial — if the jury disagree he may traverse the case or call another jury and proceed with the trial afresh. The party discontented with the result of a trial may appeal within thirty days to a Divisional Court, composed of three Judges of the High Court. The Divisional Court may order a new trial or direct the judgment to be entered which should have been entered. A further appeal in some cases lies to the Court of Appeal, *i. e.*, the other division of the Supreme Court of Judicature — five Judges hear this appeal. In some cases instead of appealing to the Divisional the parties by consent or by order appeal direct to the Court of Appeal. All these Appellate Courts sit at Osgoode Hall, Toronto. Amendments may be made at any time as may be just. In a few cases an appeal lies to the Supreme Court of Canada, sitting at Ottawa, composed of six Judges — and in a limited number of cases the final appeal from the Court of Appeal or even [upon leave] from the Supreme Court of Canada, is to the King in his Council

in Westminster — “ The Judicial Committee of the Privy Council.” The party failing may be ordered to pay the costs of the successful party, including most of his solicitor and counsel fees.

5. *Costs.*— In the High Court and County Courts on the civil side there is a fixed tariff of fees for the various services to be rendered by Solicitor and Barrister, also for witness fees, etc. The Judge before whom any action is tried has the right, and generally exercises it, to direct the losing party to pay the costs of the winning party. A Court also very generally directs the payment of costs by a party in default when extending time, making amendments and the like. In very few cases on the criminal side is there any provision for costs. Where, however, a defendant applies to have the conviction of a Magistrate quashed for want of jurisdiction or want of evidence, or the like, he must put up security for the costs, and if he fails may be ordered to pay them.

6. *Volume of Appellate Business.*—In 1908, 1,153 cases were tried by the High Court, 180 of these were appealed to the Divisional Court and 130 dismissed, 37 allowed, 10 varied and 2 still undisposed of. The appeals direct from trial to the Court of Appeal were 62, 28 were dismissed, 14 allowed, 8 varied, 12 remained undisposed of. Of all the cases in the Divisional Court, 544 in all, including the 180 from trials, only 43 appeals to the Court of Appeal, of which 23 were dismissed, 11 allowed, 3 varied. The above figures are derived from the report of the Inspector of Legal Offices. From the Court of Appeal to the Supreme Court at Ottawa in 1908 are reported in the Supreme Court Reports, 9 cases, 7 dismissed, 2 allowed [there may be, no doubt are, some cases not reported, but very few]. In the Privy Council in 1908 are reported 6 appeals from the Court of Appeal, of which

5 were all allowed and 1 dismissed; there was also an appeal from the Supreme Court in an Ontario case which was allowed. From issue of the writ of summons to the final disposition by the Privy Council there is no need for two years to elapse.

7. *Criminal Procedure*.—At the conquest of Canada by the British, 1759-60, the English Criminal Law was introduced by the conquerors, although with the exception of a few years, the French-Canadians were permitted to retain their own law in civil matters. The English Criminal Law continued to prevail except as modified by Provincial Statutes - - and these Statutes in general closely followed the legislation in the mother country. This statement also applies to the Provinces of Nova Scotia and New Brunswick. Accordingly, at Confederation in 1867 the Criminal Law of all the confederating colonies was almost identical — while the civil law of Lower Canada (Quebec) was markedly different from that of Upper Canada (Ontario). Nova Scotia and New Brunswick, the Lower Canadian law being based upon the custom of Paris and ultimately upon the Civil Law of Rome; while that of the others was based upon that of the Common Law of England. Accordingly the British America Act which created (1867) the Dominion of Canada, gave to the Parliament of the Dominion jurisdiction over the Criminal Law including the procedure in criminal matters. The Provinces, however retained jurisdiction over the constitution of the Courts of Criminal Jurisdiction as well as over property and civil rights.

For some years there were statutes passed from time to time amending the Criminal Law; and at length Sir John Thompson who had been himself a Judge in Nova Scotia, and had become Prime Minister of Canada, brought about a codification of Criminal Law and pro-

cedure. He received valuable assistance from lawyers on both sides of the House and the Criminal Code of 1892 became law. This with a few amendments made from time to time is still in force.

The distinction between felony and misdemeanor has been abolished, and offences which are the subject of indictment are "indictable offences." Offences not the subject of an indictment are called "Offences" simply. Certain offences of a minor character are triable before one or two Justices of the Peace as provided by the Code in each case. In such cases there is an appeal from a Magistrate's decision adverse to the accused to the County Court Judge both on law and fact; or the conviction may be brought up on certiorari to the High Court on matter of law.

Cases triable before Justices of the Peace as for example (§ 583), resisting the execution of certain warrants, (§ 584) persuading or assisting an enlisted man to desert, (§ 104) challenging to fight a prize-fight or (§ 105) fighting one, or (§ 106) being present thereat, (§ 118) carrying pistols, (§ 119) selling pistols or air guns to minors under 16, (§ 122) pointing pistols, (§ 374) stealing shrubs of small value, (§ 385) injuring Indian graves, (§ 431) buying junk from children under 16, etc., etc.

But offences of a higher degree are indictable.

If a crime, say of theft, is charged against anyone, upon information before a Justice of the Peace, a summons or warrant is issued - and the accused brought before the Justice of the Peace. In some cases he is arrested and brought before the Magistrate without summons or warrant; but then an information is drawn up and sworn to. The Justices of the Peace are appointed by the Provincial Government and are not, as a rule, lawyers.

Upon appearance before the Justice of the Peace, he proceeds to inquire into the matters charged against the

accused: he causes witnesses to be summoned, and hears in presence of the accused all that is adduced. The accused has the fullest right of having Counsel and of cross-examination, as well as of producing any witness, and having such evidence heard in his behalf as he can procure. All the depositions are taken down in shorthand or otherwise, and if in long hand signed by the deponent after being read over to him.

After all the evidence for the prosecution is in, the Magistrate may allow argument, or he may *proprio motu* hold that no case has been made out—in which case the accused is discharged—or he may read over aloud all the evidence again (unless the accused expressly dispenses with such reading), and address the accused, warning him that he is not obliged to say anything, but that anything he does say will be taken down and may be given in evidence against him at his trial, and asks, "Having heard the evidence, do you wish to say anything in answer to the charge?" Then, if desired by the accused, the defence evidence is called.

If at the close of the evidence the Magistrate is of opinion no case is made out, he discharges the prisoner, but the accused may demand that he (the accuser) be bound over to prefer an indictment at the Court at which the accused would have been tried if the Magistrate had committed him.

If a case is made out, the accused is committed for trial with or without bail, as seems just, the witnesses being bound over to give evidence.

Police Magistrates are appointed for most cities and towns, who are generally Barristers; these have a rather higher jurisdiction than the ordinary Justice of the Peace: in some cases with the consent of the accused.

The Courts which proceed by indictment are the High Court (Supreme Court of the Province) and the

General or Quarter Sessions. Judges of these Courts are appointed by the Crown (*i. e.*, the Administration at Ottawa) for life: and must be Barristers of ten years' standing.

The High Court can try any indictable offence: the Sessions cannot try treason and treasonable offences, taking, etc., oaths to commit crime, piracy, corruption of officers, etc., murder, attempts and threats to murder, rape, libel, combinations in restraint of trade, bribery, personation, etc., under the Dominion Elections Act.

Within twenty-four hours of committal to gaol of any person charged with any offence which the Sessions could try, the Sheriff must notify the County Court Judge, who acts as Judge in the Sessions, and with as little delay as possible the accused is brought before the Judge. The Judge reads the depositions, and tells the prisoner what he is charged with and that he has the option of being tried forthwith before him without a jury or being tried by a jury. If the former course is chosen, a simple charge is drawn up, a day fixed for the trial and the case then disposed of.

If a jury be chosen, at the Sessions or the High Court (Assizes), a bill of indictment is laid before a Grand Jury (in Ontario of thirteen persons) by a Barrister appointed by the Provincial Government for that purpose. The indictment may be in popular language without technical averment, it may describe the offence in the language of the Statute or in any words sufficient to give the accused notice of the offence with which he is charged. Forms are given in the Statute which may be followed. Here is a sample:

"The Jurors for Our Lord the King present that John Smith murdered Henry Jones at Toronto on February 13th A. D., 1912."

No bill can be laid before the Grand Jury by the Crown Counsel (without the leave of the Court) for any offences except such as are disclosed in the depositions before the Magistrate. But sometimes the Court will allow other indictments to be laid.

The Grand Jury has no power to cause any indictment to be drawn up.

Upon a true bill being found, the accused is arraigned; if he pleads "Not Guilty" the trial proceeds.

He has twenty peremptory challenges in capital cases; twelve if for an offence punishable with more than five years' imprisonment, and four in all other cases — the Crown has four, but may cause any number to stand aside until all the jurors have been called.

I have never, in thirty years' experience, seen it take more than half an hour to get a jury even in a murder case — and I have never but once heard a juryman asked a question.

In case of conviction, the prisoner may ask a case upon any question of law to be reserved for the Court of Appeal, or the Judge may do that *proprio motu*. The Court of Appeal may also direct a new trial upon the ground that the verdict is against evidence; but I have never known that to be done.

No conviction can be set aside or new trial ordered even though some evidence was improperly admitted or rejected, or something was done at the trial not according to law or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned at the trial. If the Court of Appeal is unanimous, against the prisoner, there is no further appeal, but if the Court is divided, a further appeal may be taken to the Supreme Court of Canada. I have never known this to be done.

A wife or husband is a competent witness in all cases for an accused. He or she is compellable as a witness for the prosecution in offences against morality, seduction, neglect of those in one's charge and many others. The accused is also competent, but not compellable in all cases. If an accused does not testify in his own behalf, no comment can be made upon the fact by prosecuting Counsel or the Judge.

No more than five experts are allowed on each side.

I have never known a murder case (except one) take four days — most do not take two, even with medical experts.

“PROSPECTS”

The HONORABLE WILLIAM
RENWICK RIDDELL
(The Supreme Court of Ontario)

ANNUAL DINNER
OF THE
NEW YORK STATE BAR ASSOCIATION

UTICA, N. Y., JANUARY 25, 1913

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“PROSPECTS”

Mr. Chairman, honored guests and others: I hope you will notice the careful, judicious and judicial manner in which I begin my address. I never liked the beginning “Mr. Chairman and gentlemen.” That seemed to draw an invidious line of differentiation between the class “gentlemen” and the Chairman. (Laughter.) I like still less the beginning adopted by my friend, Judge Herrick, “Judges and lawyers”—a distinction, I take it, that is still more invidious; because I desire my friends to understand that there are some Judges at least who pride themselves upon still continuing to be lawyers. (Laughter.) Judges are not all like that Canadian Judge of whom I have told you more than once, who, when he received his patent appointing him a County Court Judge, forthwith proceeded to sell his library and buy a new gun. (Laughter.) Neither may I address you, as my brother from Montreal has done, “Mr. Chairman, ladies and gentlemen,” because while I know and everybody knows that there are ladies present, we must not appear to recognize the fact; it is precisely as if we were Judges upon the Bench trying a case unable to take judicial cognizance of a fact which even the cast-iron dogs on the street know all about. While you know and I know that ladies are present, we must not say so. But I do venture to think that my address “Mr. Chairman, honored guests and others” will cover the situation.

When two or three weeks ago upon leaving for the seaside for a little recuperation after a Canadian Christmas and New Year's — and those of you who have spent Christmas and New Year's in Canada will know a little recupera-

tion is required after these seasons — I was requested by the Bar Association of the Province of Ontario to act as their representative at this meeting. I hesitated. For, while I am a member of the Bar of Ontario, I am not a member of the Bar Association of Ontario; and, on the contrary, I am a member of the Bar Association of the State of New York, although not a member of the Bar of New York. (Laughter.) I call you to witness that I have waded my way through that sentence in such a way as to prove conclusively that I have not been devoting my whole attention to the champagne this evening. (Laughter.) I thought it was somewhat anomalous that I should represent at a meeting of an Association of which I was a member, an Association of which I was not a member; but it was argued to me that in Freemasonry and other societies, a member of a Grand Lodge is allowed to represent at his Grand Lodge a Grand Lodge of which he is not a member. The analogy seemed to be perfect; and I seemed, therefore, to be qualified — but I am afraid, what we deprecate so much in a Judge, the personal equation, was not absent but that the wish was father to the thought.

I am here, in any case, representing the Bar of the Province of Ontario, the lawyers of the Province of Ontario; and I bring to you their warmest greetings. (Applause.) They recognize you and desire to be recognized by you as fellows in pursuit of the grand object of justice and righteousness. They recognize and know your strong men, they recognize and know your strong Judges and their judgments; and they wish you all possible prosperity, material or otherwise. While I am here as such representative — it being I think the fourth occasion upon which I have had the opportunity and the pleasure of addressing an audience of this character — I must confess that even had my Asso-

ciation — I mean the Association which I represent — omitted to ask me to represent them and had my friend, Mr. Wadhams, by some aberration of intellect (because it could only be such an aberration which could affect such result), forgotten to send me an invitation, I believe I should have come without one. (Laughter.) You remember the story of the little girl who said to her mother, "Oh, mother, I do just love this cake, it is awfully good." Her mother said, "Why, Mary, don't talk that way, you ought not to love anything that can't love you back, there is no use in saying 'just,' and don't say awfully, say 'very.'" So she said, "Mother, I like this cake, it is very good. Oh, dear, mother, I seem to be talking about bread." (Laughter.) Now, I can't use the language that I would like to use to you, speaking to the members of the New York Bar, because I "am come of the blood slower to bless than to ban" and "Deeper than speech our love, stronger than life our tether. But we do not fall on the neck nor kiss when we come together." The words which I must use fully to express the affection which I bear toward the American people and toward you as some of the American people, would be such as no English speaking man uses, as a rule, to another.

When I am here meeting you again, I am asking myself the question, "Where are we at?" Now, I don't say, "Where am I at?" because I am always afraid of misapprehension. You remember the story of the Englishman who came to this country some years ago when the expression "Where am I at" was in all its vogue. He said, "I don't understand why you Americans always say "Where am I at;" we say in England, "Where *his* my 'at?" (Laughter.) I don't say "Where am I at" but I say "Where are we at?"

Just a week ago down in Philadelphia. I heard a very prominent and learned member of the Bar of Philadelphia speak in most fervent tones, with tears in his voice, if not in his eye, bewailing the passing away of the Constitution of England, the downfall of the ideal Parliament of which he had read in Blackstone. He assured us that the American lawyer was a far better judge of the English Constitution than a Canadian lawyer could possibly be of the American Constitution. That rather hit me because I have been talking a good deal lately about the American Constitution as compared with the English or the Canadian Constitution. It is true that gentleman spoke about the King as being one of the "three estates of the realm," but that is a simple matter of trifling detail that I shall not dwell upon. He went on and almost wept over the abolition of check and balance. It was in vain for me to say that while a balance wheel was all very well for a stationary engine which never moved from the one spot, nobody ever saw one in a locomotive engine which got somewhere.

He wept over the emasculation of the historic House of Lords and execrated all change since the time of George III; he said Canada and Great Britain, England, had become democratic, the people (he said "the mob" but of course, he meant "the people") the people were having their own way, their own wicked will unchecked. Then he said that the Americans are the true conservatives. Now, that was a Philadelphia man. (Laughter.) Of course, I know that some of you do not look upon Philadelphia as quite chain-lightning or even up to date. I am quite aware of what the New York lady did at a literary soiree; when illustrating the well-known book "The Quick and the Dead," she hung over her shoulder the names of the two cities, New York and Philadelphia. (Laughter.) But I

am going to tell you what a Chicago man said; and Chicago is up to date every time. Chicago prides herself on having the *dernier cri* in everything — in fact, when a Chicago man was being shaved in New York — in a barber shop I mean, not in Wall street — (laughter), and he was asked whether he would have his hair cut, he said, "No, Sir, I never have my hair cut in the country." (Laughter.) A prominent member of the Chicago Bar not very long ago told me — we were talking about the defects in the administration of the law, lawyers always talk about that and even some Judges — we were talking about the defects in the administration of justice and he regretted some of the defects in his State: "But," he added, "we got that from England." I said, "Why in the name of common sense, don't you correct them as they did in England?" "Oh," he says, "We are a conservative people." (Laughter.) So hearing that from such different sources, I came to the conclusion that the American people were a conservative people; and I looked to the American people to conserve everything that is old. And particularly to American lawyers, because lawyers are well-known to be the most conservative class of any community, and I knew there were some really choice antiques in your practice.

But what do I find? I come here to this city and I find that the lawyers of this State are trying to change the rules of practice of the Courts. Why, it is said that they are actually intending to have a change made in the rules of practice so as to bring about a prompt and final determination of all legal controversies according to the very substantive rights of the parties. Well, of course, I am not a member of the New York Bar, as I told you before, although I have the honor to be a member of the New York Bar Association, and I must accept the proposition that as things stand at

present, that is not the effect of your practice — a thing which would hardly be credible were it not for the solemn asseveration of my lawyer friends; but I have no evidence the other way. What! are they going to have a prompt and final determination of all litigation? Why, you remember the story of the English solicitor whose son had been recently sworn in; when he had come into the office, his father went away for a six months' holiday; and when he came back he said, "John, how have you been getting on?" "First rate," the son replied. The father said, "What have you done?" The son said, "You know the old case of Jarndyce against Jarndyce?" The father said, "Yes." The son said, "That is settled." The father said, "My God, John, did you settle that case?" The son proudly replied, "Yes, I have, father." "Oh, John," he says, "That case has paid the expenses of this office for sixty years." (Laughter.) That is the sort of thing you are going to have in New York; your old cases are going to be settled in a few years; and according to the very substantive rights of the parties, too. What! do you mean to tell me that after this, the man is not going to win who has the smartest lawyer? That a litigant is not going to win according to the method in which his lawyer happens to put his claim upon paper? Why, you are revolutionizing matters.

Goldwin Smith used to say,— you know Goldwin Smith, you have heard of him, he came from Cornell by the way (applause), but when he got into Toronto he didn't want to go back again (laughter),— you think that is a joke, but it is not — Goldwin Smith used to say that to expect the lawyer to reform the practice of the law is to expect the tiger to abolish the jungle. And here I find these tigers actually engaged in abolishing the jungle, not old man-eating tigers who have lost their teeth, but tigers

who are the very leaders of the tiger band; my friend, Mr. Moot, here, for instance, Mr. Hornblower of New York, John G. Milburn,— tigers of that class. I do not say anything about the Judges or the ex-Judges, because you never can tell what a Judge is going to do. A Judge when he sets out a reforming is something like the Highlander, who when he gave up his kilt, bought the very largest pair of trousers he could get in all London. (Laughter.) Reformers are always enthusiasts, and you never can stop them; a Judge turned reformer is a Habbakuk *capable de tout*. (Laughter.)

I was delighted to meet my friend, Governor Hadley, here; indeed, he can't get rid of me! Ever since I became acquainted with him, he and I have continually run up against each other; and I was delighted to meet him again, and regret very much that he is not able to be with us this evening. In his State of Missouri, I understand the lawyers have every now and then, gotten together and endeavored to have a rectification and reform made in the practice of the law; but the farmers there, as in some other States, are in the majority in the Legislature; and they always believe that where the lawyers desire anything, they want it for their own personal advantage; and they have accordingly always voted down any amendment that the lawyers wanted. Of course, that is foolish.

But I understand, in this State the lawyers have the upper hand. I gather that is so from what I see; because if the audience that I see before me and the like of them are not able to govern the State, then the State does not deserve to be governed. I understand that the lawyers of this State have control of the Legislature, and that being so, why, then this act must necessarily go through. But what are you thinking about? Demetrius, the silversmith of Ephesus, knew

better, he called together those who were engaged in certain occupations and showed them that their craft was in danger of being set at naught, whereupon they were all filled with wrath and cried "Great is Diana of the Ephesians." Is this body of lawyers less loyal to their ancient mystery than those who made money out of her, were to Diana of the Ephesians? Are you going to have that beautiful amendment passed so that people are to come into their own, all without a word of protest from the old-time lawyers? The first thing you will know is this — some lawyer who has paid attention to practice instead of to substantive law will find himself in the position of a lawyer whom I knew who devoted all his attention to bankruptcy law, and one morning he woke up and found Congress had repealed all the law he knew. (Laughter.) There is remaining, however, a little bit of comfort for the "master of practice." While the Courts, I see by the proposed amendment, are to have the power of disregarding all mistakes, errors, irregularities or inaccuracies in any stage of a case so long as it does not affect the substantive rights of the parties, just give me a good old timer of a Judge, give me one of the old "practice" sort, and I will guarantee — almost guarantee — that nine out of ten irregularities and mistakes will be found to be "affecting the substantive rights of the parties." (Laughter.) I can almost hear the argument, I can almost formulate those profound maxims of Constitutional law, I can almost hear the ardent and earnest adjurations of learned counsel to the Judge; and what counsel don't think of, it is highly probable the Judge may. You remember, I suppose, the story of the little girl whose mother caught her fighting with a neighbor's girl and she says, "Why, Mary, how in earth did you come to do that? Surely Satan must have put it in your mind to

act the way you were doing." She says, " Well, mother, maybe Satan *did* tell me to pull her hair, but I thought out kicking her shins, myself." (Laughter.) It may be the lawyer will have to put some thoughts into the old-time technical Judge, but he will think of most objections himself. Judges are naturally a technical class; I know them; I live among them, and am one of them, I know all about them, and that it is hard to get a Judge out of the old way. But allowing full discount for conservative lawyers and technical Judges, what does all this change mean? Does it not mean that the law in this State is to cease to be a game to be played according to certain prescribed rules. With the Judge on the Bench simply an umpire to see that the rules are observed, and with the result that the smartest man will win? That all parties will now receive their rights according to the very facts, that the State is interfering with a strong hand to vindicate the rights of the oppressed and the wronged, that the majesty of the people rises and says let every man have his due? That being so, my friends, has not the lawyer once more vindicated his right to exist, has he not once more shown himself the unselfish friend of the people, doing good to the people even at the expense of himself? Is not the Professor's " tiger " of the jungle shown to be not the tiger, but the hunter driving out from the jungle, banishing all evil and ravening beasts of prey? And that being so, I am reconciled to the loss of much legal and technical learning and acumen. Not again in this State will a lawyer like Parke visit a sick friend and cheer him up with a beautiful demurrer, but real law will not suffer — and better still, the client with an honest case will not suffer. In this, as in all else, the people are coming into their own.

This nation is about to try an experiment, an experiment of tremendous importance as compared with anything

involved in a change in the practice of the law. This nation has recently gone through its quadrennial proceeding of electing its monarch for the next few years — it has been well said that the American nation from time to time elects its monarch for a limited time — it looked a short time ago as though it might be for an unlimited time. (Laughter.) The kindly gentleman, the able, diligent, painstaking, accurate and learned Judge has failed to strike the imagination or to awake the enthusiasm of the American people. He has said with a melancholy smile, "I do not seem to have been a grand success." To the gibe that a Mormon carried in his trousers' pocket one-half of his electoral votes, there was, there could be no answer; and yet even that small number of votes is a larger number than was received by a very great predecessor, John Jay, the first Chief Justice of the United States. John Jay once received the three votes of Connecticut; but then we all know Connecticut knows a good thing when she sees it; and has not lost that power to the present time — as witness the election of our friend, Simeon Baldwin, as her Governor. (Applause.) I am fain to believe, I desire to believe, that the rejection, if I may so call it, using I think not a harsh term, of William Howard Taft (applause), whose friend I am glad to call myself, whose admirer as Judge and lawyer, every lawyer is who knows his legal record (applause) — I venture to hope and to think that his rejection, not dishonorable, is not due to the same cause as the rejection of John Jay. History tells us that John Jay was sent abroad by George Washington to negotiate a treaty with the mother country, to put an end to the difficulties between the mother and the daughter. He gave up his high position as Chief Justice of the Supreme Court of the United States in order that he might thus serve his country; and while he did not secure

the treaty for which he perhaps had hoped and for which he labored, doubtless he brought back a treaty as favorable as could be obtained under the circumstances. When he returned, the Democratic-Republican party covered him with curses and obloquy; burned him in effigy, denounced him as a traitor; and that man of whom Daniel Webster could say, "When the spotless ermine of the judicial robe fell on John Jay it touched nothing less spotless than itself," was ranked with the vilest of the vile. This great State indeed, stood by him and re-elected him Governor; but his great heart was broken and he retired into seclusion and obscurity, dying long before man's allotted age. Washington himself did not escape calumny. But wisdom is justified of her children. The treaty which John Jay negotiated in 1794, "Jay's Treaty," the beginning of modern international arbitration, now forms Jay's best claim to immortality. The methods laid down in that treaty of 118 years ago have been followed time and again by these two great kindred people in order to determine matters in controversy between them. On nineteen subjects altogether have these two people deemed it proper to determine the questions in controversy between them by international arbitration, either by arbitrators appointed by the governments themselves, or by arbitrators in part appointed by foreign potentates, or by foreign potentates themselves deciding, or by the judicial decision of the Hague Tribunal. This city is proud indeed to be, and ought to be proud to be, the scene of an award made on the 18th of June, 1822, very nearly a hundred years ago, when Messrs. Porter and Barclay, appointed under the sixth article of the Treaty of Ghent, 1814, laid down the international boundary for hundreds of miles by lake and plain and mountain and stream, an award which was adopted by both parties cordially and without hesitation and which has stood the test of time. It is true, indeed, that

this was not the first international award, because seven years before, Holmes and Barclay settled the international boundary at Passamaquoddy Bay; but that has not I understand been entirely satisfactory to the United States in recent years. For while the Grand Manan and most of the other islands were given to New Brunswick and Nova Scotia, to the United States were awarded the Islands of Frederick, Dudley and Moose. You all know about "Brazil where the nuts come from," but I dare say some of you do not know of "Moose Island where the Moose come from." (Laughter.) "*Fons et origo mali*"—or is it "*boni*?"—I do not know, I am not an American citizen. (Laughter.) It has been by arbitration determined what are the international boundaries for thousands of miles and in climes temperate and arctic, what sum the United States should pay for land of British subjects which it had confiscated in the west, what Britain should pay because her defective municipal laws allowed an Alabama to escape and destroy American shipping, what she should pay for the St. Alban's Raid, what fish Americans should be allowed to take and what sum the United States should pay for fish they should not have taken, what seals the Canadians should be allowed to take and what sum they should be paid for seals which they ought to have been allowed to take; what Britain should pay Americans for slaves who running away from their American masters, from the land of the free and the home of the brave (presumably because they were not free and it was no use being brave), had reached British territory by reaching a British man of war. That is a chapter in the history of your country and mine of which I as a Britisher, am, perhaps inordinately, proud.

"Slaves cannot live in England; if their lungs

Receive our air, that moment they are free

They touch our Country and their shackles fall."

In 1822, after the War of 1812, Great Britain paid over \$600,000 for slaves who had run away from their masters in free America and put their feet on "the Tyrant's" ship, a British ship, thereby becoming free men and England could not give them up. All of these subjects have been determined during this time; and only once has it been found necessary to call in war. War, my friends, as I have often said is *the* short and ugly word in a language that is full of short and ugly words. No man has any good to say of war except, indeed, an occasional Bishop. I read the other day in a newspaper — and God forbid that I should judge any man by what I see of his sayings in a newspaper, they talk about what I am supposed to have said sometimes and almost always wrongly — but I saw that a Bishop the other day, I think in Philadelphia, had spoken highly in favor of war, because God brings good out of war. God could bring good out of an epidemic of cholera or small pox; but I never yet heard that advanced as an argument for spreading the virus of either or for putting a stop to quarantine. When I hear of Bishops talking that way, were it not for the fact that Bishops of another Protestant Communion pray daily "Give peace in our times, oh Lord," I might be pharisaical enough to thank God I am a Presbyterian of a church that knows nothing about Bishops.

There are existing now no less than three permanent arrangements between your people and mine; and we have had a century of peace. We hear so often the story of war and battle and blood, but who has told the story of the century of peace? Only once during that time or from shortly before that, was it found necessary to bring in the bloody aid of war. That War of 1812 has not yet wrought out its full demon's work, but thank God the hate,

the enmity engendered by it is dying out. There was another arbitration treaty which our friend, President Taft, desired to have made between these two people; but he failed. He said the other day, "When I negotiated a treaty with England and with France, I had a dream, but I woke." The dream he had was that we were by treaties between the United States and the several European countries and between these countries approaching rapidly to an arbitral court for all international disputes. The greatest misfortune that this generation has seen is the wakening of President Taft. (Applause.) I am not here to find fault with or to lecture any people or any nation. The people and the government of the United States are the guardians and the judges of their own honor; and it would be impertinent, outsider as I am, to suggest anything to them as regards the guarding of their honor — and let me say now, something I had nearly forgotten, I don't like your talking about me as being a foreigner. I am not. I am not an American, I am a Canadian to the last drop of my blood. I am a British subject and proud of it, and have no desire to change my nationality or my allegiance; but where the two flags with the same red, white and blue, although differently arranged, float, wherever there are two people of kindred origin, of the same language, who worship God under the same form, who have the same magnificent history in the past — no one born under either flag should be called a foreigner when he is under the other. (Applause.)

Wherever I hear the English language spoken and know the English common law the rule for decision, there I am not an alien or a foreigner. (Applause.) There is at the present time an agitation going on which looks as though there might be trouble between the two people. No fear. It is not coming. It is not fated. It is not possible. No

doubt as at all times when there is a difference of opinion, there appear those to peep and gibber, those described by a great Conservative paper in Toronto as public enemies, who desire and try to stir up enmity between the two peoples — but they are doomed to disappointment and must be doomed to disappointment. (Applause.)

The hope of the world to-day is in the English speaking peoples. (Applause.) I don't say the Englishmen, there is not a drop of English blood in my body. (Applause.) I do not say the Anglo-Saxon, I am not Angle or Saxon. I do not say British because, British indeed as I am, the greater part of the English speaking people does not reside in a British country. I say the English speaking people, whether they be English, Scotch, Irish, Gaelic, Highland, American or French Canadian — the hope of the world to-day is in the English speaking people. Now, I have no patience with those people who say, "What are you Canadians going to do with the French Canadians?" I am proud of the French Canadians. The French Canadian is abundantly able to look out for himself; and I for one would look upon it as a distinct loss in our life, public and private, if that virile, picturesque, splendid race were to disappear. (Applause.) But he becomes of importance in the world and internationally only when he speaks English. France, the pioneer for liberty and freedom of thought for generations, now has all she can attend to in looking to her north-eastern boundary and guarding against the invader — a nightmare ever present. Germany of the same blood as you and I, a splendid and noble nation, is ever watching against the Serb and the Slav, she is watching Russia, she is watching to the south, she has all she can attend to; nor is there any hope in Russia for another hundred years, or in Austria, or Italy, or Spain. Each one of these nations

has all the burden it can bear — its own burden. Who then is it that will take up “the white man’s burden?” Who is it will take up the white man’s burden and do the world’s work, work which *must* be done? The exceedingly bitter cry of the slave is rising daily before the throne of God, the scalding tear of the oppressed and of the wronged and the poor is hourly bedewing His footstool — who will still the one and dry the other if not the English speaking people? The English speaking people are the hope of the world. The eternal statute of heaven has made us one, the imperial degree of God himself has joined us together and whom God hath joined together, let no man put asunder. (Applause.)

THE JURY SYSTEM IN ONTARIO

PAPER PREPARED

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THE JURY SYSTEM IN ONTARIO

By the HONORABLE WILLIAM RENWICK RIDDELL, Toronto,
Justice of the Supreme Court of Ontario.

When Canada was conquered and became part of the British Empire, the jury had no part in its jurisprudence, the law in force being the *Coutume de Paris* modified by local ordinances.

In 1763 the English law, civil and criminal, was expressly introduced by Royal Proclamation (October 7th, 1763), having been somewhat informally administered for the three preceding years by Courts presided over by British military officers.¹

The English law did not prove entirely satisfactory to the French-Canadian; and in 1774 the Act 14 George III, c. 83, sec. 8, provided that in "all matter of controversy relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision * * * and * * * be determined agreeably to the said Laws and Customs of Canada." Sec. 11 continues the English Criminal Law on account of its "certainty and brevity * * * and the benefits and advantages resulting from the use of it." Power was given to the Governor and Legislative Council to change either civil or criminal law.

¹There is some doubt as to the administration of law during the three years of military rule. In the Montreal and Three Rivers Districts it is quite certain that there were Courts held by officers of the militia, French-Canadians, who almost certainly decided civil cases according to what they believed to be French-Canadian law—they were directed by the Governors to decide "*avec justice et droiture*." They do not seem to have exercised criminal jurisdiction and there was an appeal to the commanding officers of the Royal troops, and a second appeal to the Governor himself.

In Quebec District (Amherst having divided the inhabited parts of Canada into these three Districts), Murray, the Governor, seems to have had Courts of British, not Canadian, officers. These, it is probable, rather leaned to English law.

There were no settlements in the territory afterwards Upper Canada at that time; but during and particularly after the Revolutionary War, settlers made their way across the Rivers St. Lawrence, Niagara and Detroit into the vacant British wilderness. These were chiefly from New York, New Jersey and Pennsylvania, but some came from other States, the Cavaliers of the new Revolution who preferred their old flag and their allegiance to anything the new Republic could offer.

They brought with them their traditional law and customs; and the foreign law imported from France they could not reconcile themselves to. The detestation of the English Civil Law by the French Canadian, and the detestation of the French law by the British Canadian, had much to do with the law of 1791, 31 George III, c. 31, which divided Canada into Upper and Lower Canada, gave each a legislature and left to each to select and make its own law.

In 1788 Lord Dorchester had divided into four districts the territory afterwards Upper Canada, and had erected Courts of Common Pleas with civil jurisdiction in each district. In the district furthest west, Hesse District, including Detroit, only one Judge was appointed, William Dummer Powell, a barrister of high standing, born in Boston, educated at the Inns of Court who afterwards became Chief Justice of Upper Canada. In each of the other Courts three Judges were appointed, all laymen.

In these Courts all cases were tried without a jury.

But the English Criminal Law was in force. Courts of Quarter Sessions were held for minor offences, and of Oyer and Terminer and General Gaol Delivery for all criminal offences. In these Courts there was a jury.

The first Parliament of Upper Canada met at Newark (Niagara.) Of the sixteen Members of the House of

Assembly at least twelve were United Empire Loyalists, one was an English Barrister sent out as Attorney-General, another a son of an English army officer (the British Commandant at Detroit²), and only one a French Canadian.

The very first act passed by this Parliament provided that "the authority of the * * * laws of Canada * * * forming a rule of decision in * * * matters of controversy relative to property and civil rights shall be annulled, made void and abolished." 32 George III, c. 1 (U. C.), s. 1. Section 3 directed that resort should be had to the laws of England as the rule for the decision of the same.

Immediately thereafter was passed Chapter II of the same Statute: "From and after the 1st day of December * * * 1792 all and every issue and issues of fact * * * in any action real, personal or mixed and brought in any of His Majesty's Courts of Justice within this Province shall be tried and determined by the unanimous verdict of twelve jurors duly sworn for the trial of such issue or issues which Jurors shall be summoned and taken conformably to the Law and custom of England;" and the jury was empowered to bring in a special verdict.

In this way the English Jury System was introduced into Upper Canada in its entirety, with the exception of the Special Jury; this was introduced by the statute next to be mentioned.

In 1794 was passed 34 George III, c. 1, "An act for the Regulation of Juries," which provided for a list being delivered to the Sheriff by the Clerk of the Peace, of the householders for the Sheriff to draw up his panel. A

²David William Smith (afterwards Sir David William Smith, Bart.,) was the son of Major (afterwards Colonel) John Smith and was best known as Commandant at Detroit, but he had become Commandant at Niagara before the Parliament met.

penalty not less than 20 shillings (\$4.00) nor more than £3 (\$12.00) was imposed upon a jurymen who neglected his summons; and each jurymen was to receive one shilling (20 cents), increased to 25 cents in 1822, by 2 George IV, c. 1, s. 30, from the plaintiff or his attorney for each case he was sworn in.

The complete English system of Common Law Courts was introduced by the Act 34 George III, c. 2, which instituted a Court of King's Bench for the whole Province, and abolished the Courts of Common Pleas which, as we have seen, were local Courts.

The Courts which were erected, 34 George III, c. 3, for the collection of small debts (between \$8 and \$60) and which by a course of statutory evolution finally became the County Courts, also provided for jurors "for the trial of each issue." The still lower Courts which derived their being from legislation in the first session (32 George III, c. 6) and whose jurisdiction was limited to \$8.00, had no jury; the issues of both law and fact were in these Courts decided by Justices of the Peace. These Courts, called Courts of Requests, ultimately became the Division Courts of the present time.

In 1808, an Act, 48 George III, c. 13, was passed for the better regulation of Special Juries in both civil and criminal cases.

In the Common Law Courts the first break in the jury system was made in 1868 by the Law Reform Act of that year, 32 Victoriae (Ont.), c. 6, which by section 18 enacted that all issues of fact in the Superior Courts of Common Law or the County Courts (formerly known as District Courts) and all assessments of damages might be tried by a Judge with a jury, and should be so tried unless one of the parties filed with his last pleading a notice requiring a jury.

Even if a jury notice was given the parties might still agree at the trial to dispense with the jury; and even if a jury notice was not served, the Judge might require the action to be tried or damages assessed by a jury. The Judge, however, had no power to strike out the jury *in invitum*, where a jury notice had been served.

The Administration of Justice Act of 1873, 36 Victoriae (Ont.), c. 8, took the matter further and laid down the practice as to juries substantially as it is at present in the Supreme Court and the County Courts. The statute allowed defences on equitable grounds to be set up in common law actions as well as purely money demands to be proceeded for although the plaintiff's right was purely equitable. Such cases might be transferred to the Court of Chancery, but the Common Law Court might itself try them out and give complete relief. Section 16 provides that when equitable issues were raised, the case should be tried without a jury unless the Court or Judge otherwise ordered. Section 17 is as follows:

"In actions of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment, all questions which might heretofore have been tried by a jury shall be tried by a jury, unless the parties * * * waive such trial."

Sec. 18. "All other issues shall be tried as heretofore, unless the Court * * * or a Judge * * * upon application having been made before the trial or unless the presiding Judge upon the trial directs or decides that the issue or issues shall be tried and the damages assessed without the intervention of a jury."

Section 20 gave power to the Trial Judge to require the jury to give a special verdict.

Not long after the law giving the Judge power to try all but the excepted cases without a jury, a member of the

Opposition introduced a Bill into the Assembly under the taking title, "A Bill to restore to Her Majesty's subjects their right to trial by jury;" but it was defeated by a majority of one vote.

A Court of Chancery was instituted in 1837 with a Vice Chancellor; he did not go circuit; nor did any member of the Court on its reorganization in 1849 with a Chancellor and two Vice Chancellors, but the Court sat and all business was done in Toronto. In 1850 an Act was passed allowing the appointment of Masters and Deputy Registrars in the country but the Court continued to sit in Toronto.

In 1857, the Act 20 *Victoriae* (Can.), c. 56, by s. 6, provided that the Judges should take circuits for the transaction of business; under this Act Upper Canada was divided by the Court into three Circuits including such towns as were thought proper. The same Act authorized the Court of Chancery to try any issue with a jury instead of directing a feigned issue, or sending the matter to a Common Law Court, and this continued until the Judicature Act of 1881 was passed. I never knew of this being done.

This was the state of the law at the time of the passing of the Judicature Act in 1881, 44 *Victoriae* (Ont.), c. 5, which consolidated the two Common Law Courts of Queen's Bench and Common Pleas and the Court of Chancery. Section 45 provided that subject to rules of Court the mode of trial should be as was then provided by law for like cases in actions in the Common Law Courts, and in cases over which the Court of Chancery had exclusive jurisdiction according to the existing practice of the Court of Chancery. This provision has been repeated in substance and with but slight variations in the subsequent legislation.

In 1896 the Statute 59 *Victoriae* (Ont.), c. 18, directed actions against municipal corporations for damages for non-

repair of sidewalks, streets, etc., to be tried by a Judge without a jury.

As the law now stands there are these classes of cases:

1. Those which must be tried by a jury unless the parties in person or by solicitors or counsel consent. These are cases of libel, slander, crim. con., seduction, malicious arrest, malicious prosecution and false imprisonment. 3-4 George IV, c. 19, s. 53.

2. Those which must be tried by a Judge, *i. e.*, actions against a municipal corporation and for non-repair. 3-4 George IV, c. 19, s. 54.

3. Those which are tried by a Judge unless he otherwise orders: (a) Equitable issues, s. 56 (4). (b) See class 4.

4. In other cases if either party desire a jury, he files and serves a jury notice within four days of the close of the pleadings. If the other party submit, the case goes on the jury list for trial. If the other party object, he may move in Chambers before a single Judge. For a long time there was a conflict of judicial opinion as to the principle to be followed in striking out a jury notice. Finally we made a rule making it obligatory upon the Judge in Chambers to strike out the jury notice "when * * * it appears to him that the action is one which ought to be tried without a jury." C. R. 398. It is expressly provided, however, that the refusal of a Judge in Chambers to strike out the jury notice shall not interfere with the right of the Trial Judge to strike it out; nor does the order of the Judge in Chambers striking out a jury notice interfere with the right of the Trial Judge to have the case tried by a jury.

If a jury notice is not served the case goes on the non-jury list and will be tried by a Judge without a jury unless the Judge himself prefers it to be with a jury.

At every Assize town for the jury sittings there are two lists prepared, one a jury list (which is placed first) and the other a non-jury list. It is a common practice for the Trial Judge at the beginning of the sitting to run over the records and strike out the jury notice in such as he thinks proper.³ It is not uncommon to place the records in such instances where they should have been in the first instance on the non-jury list; thereby the offending may be penalized, losing time waiting for the action to be tried.

In most of the Assize towns there are also non-jury sittings; at these no jury cases are entered, but if a case should appear which the Judge thinks should be tried with a jury, he may adjourn it to the jury sittings. (I have never known a case of this kind.)

At Toronto there are separate sittings for jury and non-jury cases, the non-jury sittings being practically continuous and the jury sittings six to ten weeks in the year. If a case comes before the Judge presiding at the jury sittings which he thinks should not be tried with a jury, he sends it across the hall to the Non-Jury Court. No doubt if the reverse were to happen the record might be transferred in the opposite direction. But, as I have said, I never knew a case of that kind.

It has been pointed out that by the Statute of 1792 the jury was authorized to bring in a special verdict — which goes back to the Statute of Westminster the Second, 13 Edward I, c. 30, s. 2.

The Administration of Justice Act, 1873, 36 Victoriae, c. 8, s. 20, made it unlawful for a jury (except in an action of libel) to bring in a general verdict if the Judge should otherwise direct and made it their duty if the Judge so

³While technically an appeal may lie against the order of the Judge at nisi prius striking out a jury notice, the practice is almost unknown. I know of but two instances, both unsuccessful.

directed to bring in a special verdict. This got rid of much of the evils of a general verdict, but it was not wholly satisfactory. Accordingly in 1874 an Act was passed, 37 Victoriae, c. 7, which by section 32 provided that except in actions of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment, the Judge instead of taking a general or special verdict, might direct the jury to answer any questions of fact stated to them for that purpose, and made it the duty of the jury to answer the questions and abstain from finding a verdict. Upon the answers to the questions the Judge enters the verdict. (The exceptional cases are now cut down to libel alone.)

Before 1895 civil juries were required to be unanimous (as criminal juries still are); but in that year by the new Judicature Act, 58 Victoriae, c. 12, s. 112 (3), it was declared sufficient if ten jurors agreed in the verdict or in the answer to the questions. The point was raised more than once but never decided whether the same ten must agree in the answers to all of the questions. This question was laid to rest by the Judicature of 1913, 3-4 George V, c. 19, s. 58 (3), which answered it authoritatively in the negative.

In the case of a special jury (*rara avis in terris, nigroque simillima cygno*), unanimity is still required — I have seen two special juries in my thirty years' experience, and do not expect to see another. I do not know the slightest advantage they present, and it is not unlikely that that "institution" will die of inanition.

The jury system in the Supreme Court and the County Courts, I have now explained.

A Surrogate Court is found in each county or union of counties, presided over by a Judge who (in every instance but one) is also the Judge of the County Court. This Court

deals with grants of probate and administration, executors' accounts and the like.

In 1793 by 33 George III, c. 8, Surrogate Courts were established in every district, but no power was given to try issues of fact with a jury. In 1855, the Act 22 Victoriae (Can.), c. 93, by s. 18, gave power to the Judge of the Court to try any question of fact with a jury; and this is still the law, 10 Edward VII, c. 31, s. 28, which directs the trial to take place at the next sittings of the County Court. This is to save the expense of making a special call for a jury. The jurors in all these Courts are of the traditional number of twelve.

The lowest Court of all is the Division Court which is "the poor man's court." This is presided over by a County Court Judge who tries practically all the cases without a jury. The origin of the Division Court is to be found in the Court for small debts provided for in the Act of 1792, 32 George III, c. 6, and called the Court of Requests. This was presided over by two or more Justices of the Peace till 1833, when by the Act 3 William IV, c. 1, it was enacted that Commissioners should be appointed as Judges by the Governor. In 1841 the Act 4-5 Victoriae, c. 3, provided that the Acts should be called Division Courts and be presided over by the Judge of the District Court (the District Courts became County Courts in 1849, 12 Victoriae, c. 78, s. 3). The same Act, 4-5 Victoriae, c. 3, by sec. 29, gave either party the right where the claim exceeded £2.10.0 (\$10.00) to require a jury on paying the proper fees in that behalf, but in all other cases the Judge remained the final and only authority. In 1845, the Act 8 Victoriae, c. 37, by sec. 6, made it necessary that the jury should be unanimous. The law remains the same except that to entitle to a jury the claim must now be over \$30

unless in tort or replevin when the amount must be over \$20.

In the Division Court also, even if the parties have not demanded trial by jury, the Judge may have any fact or facts controverted in the cause tried by a jury. This provision was introduced in 1853 by the Statute 16 Victoriae (Can.), c. 177, s. 11, and has been in force continuously ever since.

In the Division Court the jury is composed of five persons; in all other Courts of twelve.

The number of cases tried in the Division Court with a jury is very small indeed, almost negligible. In the Division Court in Toronto last year were tried 2,853 cases without a jury, and one with a jury.

The official report of the Inspector of Division Courts for 1913, just to hand, shows that in 1913 the total number of suits entered in these Courts in the whole Province was 63,675.

And the number of juries called for 117, a little less than one-fifth of one per cent.

The whole amount claimed in the suits brought was about two and a half millions; the cost of the juries averaged a few cents over \$10.

In the Surrogate Court at Toronto, *i. e.*, the Surrogate Court of the County of York, there never has been a case tried with a jury, and extremely few in the Province. (I know of only two in my thirty years' experience.) There were six cases tried in Toronto without a jury in 1913.

In the County Court at Toronto there came on for trial at the jury sittings 67 cases, of these the jury notice was struck out in 13, leaving 54 actually tried with a jury.

Including those in which the jury notice was thus struck out there were 238 tried without a jury, *i. e.*, in 67 cases a jury was asked for by one party or the other, while in 225 both parties desired the trial to be by the Judge without a jury. I may add that of these 292 cases, 40 were appealed.

In the Supreme Court in Toronto in 1913, 71 cases came on for trial at the jury sittings, in 2 the jury notice was struck out and 69 were tried with a jury. One hundred and ninety-three were tried without a jury.

Most of the cases in which a jury is permitted are for damages against railways, street railways, automobiles, etc., and especially in cases of injury to workmen. If actions by workmen against their employers be taken from the jurisdiction of the Courts as is suggested, the jury cases will be very largely cut down.⁵ The number of cases in which a jury is asked for is not increasing but rather the reverse, and there is no desire on the part of the people to take away from the Judges the power of dispensing with a jury.

So far, I have been speaking of civil cases. I shall now add something as to criminal cases.

The old common law rule as to trial by the Quarter Sessions and Courts of Oyer and Terminer long remained in force but it became cumbrous.

In 1834 by the Act 4 William IV, c. 4, power was given to a Justice of the Peace to try cases of assault and battery not accompanied with attempts to commit felony, also malicious injury to property (not felonious), and dis-

⁵Legislation has now been passed coming into force during the present year which will relieve the Courts of these Workmen's Compensation cases, thereby reducing very materially the percentage of jury trials.

turbing religious worship, but an appeal was given to any one so convicted to the Quarter Sessions and the appeal was before a jury.

This it will be seen was an interference with the traditional right of trial by jury in every criminal case. The procedure was found advantageous, and from time to time power was given to Justices, one or two, to try other offences. I do not intend here to give a history of evolution but simply to state the law as it at present stands.

By the British North America Act of 1867, 30-31 *Victoriae* (Imp.), c. 3, s. 91 (27), the Dominion was given jurisdiction in "the Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

Notwithstanding this the Province has the power to make the violation of any of its enactments a crime and to enable municipal corporations to make by-laws and to make violation of such by-laws a crime; these crimes are tried by Justices of the Peace without a jury. But in these cases the word crime is used in a broad sense. In crime proper, the Dominion has full and exclusive jurisdiction, and the law of crime has been codified by the Dominion Parliament. It is now to be found in the Revised Statutes of Canada (1906), c. 146, with a few amendments.

Crimes are divided into indictable offences and offences not indictable. The latter are tried without a jury, the former in most cases may be tried without a jury if the accused prefers.

Non-indictable offences are as follows (I add the trial tribunal) :

Sec. 83. Resisting a warrant for searching for a deserter.

Two Justices of the Peace.

- Sec. 104. Sending challenge to fight a prize fight.
One Justice of the Peace.
- Sec. 105. Fighting a prize fight.
One Justice of the Peace.
- Sec. 106. Being present at a prize fight.
One Justice of the Peace.
- Sec. 107. Leaving Canada to engage in a prize fight.
One Justice of the Peace.
- Sec. 116. Carrying offensive weapons so as to cause
terror.
Two Justices of the Peace.
- Sec. 118. Carrying pistols, air-guns, etc.
One Justice of the Peace.
- Sec. 119. Selling pistols, etc., to minors under 16.
One Justice of the Peace.
- Sec. 119. (2). Selling pistols, air-guns without keeping
record.
One Justice of the Peace.
- Sec. 120. Having pistols, etc., on person when arrested.
Two Justices of the Peace.
- Sec. 121. Having pistols on person with intent to do
harm.
Two Justices of the Peace.
- Sec. 122. Pointing firearm or air-gun at anyone.
Two Justices of the Peace.
- Sec. 123. Carrying bowie knife, dirk, etc.
Two Justices of the Peace.
- Sec. 124. Carrying in city or town a sheath knife.
Two Justices of the Peace.
- Sec. 141. Taking liquor on board H. M. ships, etc.
Two Justices of the Peace.

Sec. 146. Having any weapon in possession after Proclamation forbidding same.

One Justice of the Peace.

Sec. 147. Or conceals same.

One Justice of the Peace.

Sec. 151. Selling or giving liquor after Proclamation.

One Justice of the Peace.

Sec. 205. Public indecency.

Two Justices of the Peace.

Sec. 208. Theatre proprietor or lessee permitting indecent play, etc.

One Justice of the Peace.

Sec. 84. Persuading enlisted men to desert, etc.

One Justice of the Peace.

Sec. 126. Refusing to give up weapon to Justice of the Peace.

One Justice of the Peace.

Sec. 201. Disturbing religious worship.

One Justice of the Peace.

Sec. 370. Stealing dogs, etc., worth less than \$20.

One Justice of the Peace.

Sec. 385. Steals from or disturbs Indian graves, etc.

One Justice of the Peace.

Sec. 441. Being in possession of seamen's property, etc.

One Justice of the Peace.

Sec. 208 (2), (3). Taking part in same as actor or otherwise.

One Justice of the Peace.

Sec. 229. Looking on at common gaming house.

Two Justices of the Peace.

Sec. 230. Reviling or obstructing constables in disorderly house.

Two Justices of the Peace.

- Sec. 239. Vagrancy.
One Justice of the Peace.
- Sec. 287. Leaving hole in an unguarded, etc.
One Justice of the Peace.
- Sec. 374. Stealing trees, shrubs, etc., not under 25c.
One Justice of the Peace.
- Sec. 375. Stealing plants, roots, etc.
One Justice of the Peace.
- Sec. 376. Stealing cultivated roots, etc.
One Justice of the Peace.
- Sec. 377. Stealing part of fence, etc.
One Justice of the Peace.
- Sec. 393. Killing or wounding house dove or pigeon.
One Justice of the Peace.
- Sec. 395. Having shrubs, roots, fence in possession.
One Justice of the Peace.
- Sec. 401. Keeping anything unlawfully obtained.
One Justice of the Peace.
- Sec. 430. Secretes or offers for sale any part of wreck, etc.
Two Justices of the Peace.
- Sec. 431. Buying marine stores from minors under 16.
One Justice of the Peace.
- Sec. 436. Having public stores in possession.
Two Justices of the Peace.
- Sec. 437. Creeping or dredging near H. M. ships.
Two Justices of the Peace.
- Sec. 492. Falsely claiming Royal Warrant.
One Justice of the Peace.
- Sec. 493. Importing goods forbidden.
One Justice of the Peace.
- Sec. 500 (3). Defacing public notices by companies.
One Justice of the Peace.

- Sec. 508. Receiving trading stamps.
One Justice of the Peace.
- Sec. 519. Destroying goods, etc., on railways, etc.
One Justice of the Peace.
- Sec. 521 (2). Attempt to destroy, etc., telegraphs, etc.
One Justice of the Peace.
- Sec. 530. Destroying boundary fences or posts
Sec. 530 (2). or attempting to do so.
One Justice of the Peace.
- Sec. 533. Destroying trees, etc.
One Justice of the Peace.
- Sec. 534. Or other vegetable production.
One Justice of the Peace.
- Sec. 535. Or cultivated roots, etc.
One Justice of the Peace.
- Sec. 535 (2). Or attempting to do so.
One Justice of the Peace.
- Sec. 537. Killing or injuring dogs, etc.
One Justice of the Peace.
- Sec. 539. Wilfully committing damage of any other kind.
One Justice of the Peace.
- Sec. 542. Cruelty to animals.
Two Justices of the Peace.
- Sec. 543. Building or keeping a cock-pit.
Two Justices of the Peace.
- Sec. 544. Railway, etc., transporting live stock without food, etc.
One Justice of the Peace.
- Sec. 545 (2). Refusing admission to constable searching, etc.
One Justice of the Peace.

Sec. 551. Making or issuing business cards, etc., like a bank-note, etc.

Two Justices of the Peace.

Sec. 554. Manufacturing or importing copper coin.

One Justice of the Peace.

Sec. 566. Uttering defaced coin.

Two Justices of the Peace.

Sec. 567. Uttering copper coin (other than current copper coin).

One Justice of the Peace.

It will be seen from the above how many offences there are in which the accused has not the option of being tried by a jury but must submit to trial by one or more magistrates. These magistrates are not as a rule professional men, but are nominated *pro vita aut culpa* by the Provincial Administration.

There are a few offences that may be proceeded against either summarily or by indictment, such are:

Sec. 82. Persuading soldiers or seamen to desert.

Two Justices of the Peace.

Sec. 169. Resisting peace officers or bailiffs, etc.

Two Justices of the Peace.

Sec. 208. Leases, etc., allowing immoral or indecent plays.

One Justice of the Peace.

Sec. 435. Being in possession of public stores, etc.

Two Justices of the Peace.

Sec. 438. Buying, etc., uniforms or arms of soldiers.

Two Justices of the Peace.

Sec. 439. Buying, etc., uniforms or arms of sailors or marines.

Two Justices of the Peace.

Sec. 440. Buying, etc., of any other property of sailors.

One Justice of the Peace.

Sec. 491. Offences against trade marks, etc.

One Justice of the Peace.

Sec. 499. Wilful breaking of certain contracts.

Two Justices of the Peace.

Sec. 501. Intimidation, etc.

One Justice of the Peace.

Sec. 503. Using violence to prevent selling or buying grain, etc.

Two Justices of the Peace.

In the above offences, the Crown has the option to lay an indictment or try before Justices without a jury except in that mentioned in section 501 which is the case of a charge of violence, intimidation, following, etc., to prevent anyone doing what he has the right to do, etc., *i. e.*, the offences generally charged against strikers interfering with those who do not wish to strike. There the accused has the option of being tried on an indictment if he desires.

There are two Courts in Ontario in which a trial on indictment (proper) can be had: The Supreme Court and the General Sessions (presided over by the County Court Judge). While the Supreme Court can try any indictable offence, it is not the practice to try in the Supreme Court any case which can be tried in the Sessions.

The Sessions cannot try treason and treasonable offences, murder and attempts and conspiracies to murder, rape and attempts, piracy, judicial and official corruption, bribery under influence and personation, defamatory libel, unlawful oaths, combinations in restraint of trade. (In case of a charge of combination in restraint of trade, the accused has the option of trial before a Supreme Court Judge without a jury.)

In addition to the ordinary Justice of the Peace there is in cities and towns and in many counties a magistrate, also appointed by the Province, called a Police Magistrate with the power of two Justices of the Peace. The Police Magistrate is generally a Barrister.

If a person is accused of crime he is brought up on summons or warrant before a magistrate, whether Justice of the Peace or Police Magistrate. If the offence is one for summary proceedings only, he is tried at once without his consent; if he is convicted he may appeal to the General sessions, where the matter is finally determined by the Judge without a jury.

If before a Police Magistrate charged with keeping or frequenting a disorderly house, the accused may be tried without his consent by the Police Magistrate. If, however, he is charged before a Police Magistrate with any offence triable in the Sessions, he may with his consent be tried by the Police Magistrate with the same effect as though tried at the Sessions. If he does not consent, the practice before a Police Magistrate is the same as before any Justice of the Peace — an investigation, and if a *prima facie* case is made out, a committal for trial.

Within twenty-four hours of the committal to gaol of any one charged with an offense triable in the Sessions, the Sheriff must take him before the County Court Judge. There the Judge looks at the depositions, explains to the accused what he is charged with and tells him he may be tried by a jury or by the County Court Judge at his option. If he elects to be tried by the County Court Judge, a day is set and the Judge tries the accused without a jury. If not, he is detained or allowed out on bail, to be tried at the Sessions.

Cases not triable at the Sessions must wait the sittings of the Supreme Court.

It will be seen that in cases triable at the Sessions there are two opportunities for an election to be tried without a jury when the accused is brought before a Police Magistrate first before the Police Magistrate himself and second before the County Judge. No cases are tried in the Sessions without a jury; and in the Supreme Court only offences in restraint of trade.

In places like Toronto, most of the criminal work is done by the Police Courts, and often the accused even after electing a jury before the Police Magistrate decides on a trial before the County Judge without a jury.

In Toronto in 1913, there were nine cases tried in the Criminal Assizes (Supreme Court), 118 in the Sessions, and 371 in the County Judge's Criminal Courts.

It would be of no advantage to go into the history of the method of selecting jurors, but it may be well to add a word as to the present system in Ontario. Every British subject in Ontario of full age, not infirm or decrepit, who is assessed as owner or tenant upon real or personal property worth not less than \$600 in cities or \$400 elsewhere (or whose wife is so assessed) is qualified to sit on a jury, grand or petit, in any Court.

There are, of course, exemptions, *e. g.*, men over sixty, members of the Government, in the civil service, local or Dominion, Judges and officers of the law, lawyers, doctors, chemists, etc., etc.

In each county there is a Board of "County Selectors" composed of the County Court Judges, the Mayor of any city within the county, the warden, the treasurer of the county and the sheriff (or in his absence the deputy sheriff) of the county, three being a quorum. Of these officers who form the Board of County selectors *ex officio*, the County Judges are appointed by the Dominion Government, the

sheriff by the Provincial Government, the mayor is elected direct by the people, and the warden and treasurer by the members of the County Council, themselves elected by the people each year.

They meet September 15th, and first decide the number of jurors that it will be necessary to summon. Thirteen is the number of grand jurors and generally forty-eight, though sometimes more, sometimes less, petit jurors for the Supreme Court, and a similar number for the inferior Courts.

They then make up the number to be called from each township, etc., within the county, and instruct the clerk of the peace to notify the clerk of each township, etc., of the number to be called from that municipality.

Then in each of these minor municipalities, the mayor (or reeve), the clerk and the assessors select such persons as in their opinion "are, from the integrity of their character, the soundness of their judgment, and the extent of their information, the most discreet and competent for the performance of the duties of voters," selecting twice as many as have been required by the county selectors — then they ballot for the proper number.

The clerk of the peace (a permanent officer appointed by the Provincial Administration) **then** makes up from reports from these selectors "The Jurors' Book," and those named are summoned. The Judges may at any time issue a precept for a greater number of jurors.

In Court the grand jurors are called, and if less than thirteen are present, the panel is filled by some person or persons selected by the sheriff in Court from the petit jury panel or otherwise.

When a jury case comes on for trial, the box or urn containing the name, address and occupation of each jury-

man, written on a separate card, is shaken so as sufficiently to mix the cards, and the cards are drawn one by one by the clerk, till a sufficient number of acceptable jurors has been obtained. A *tales* may be granted if necessary. Solicitors are entitled, on the payment of a small fee, to a copy of the jury panel four days before the opening of Court; this, of course, enables them to make inquiry as to the jurymen likely to be biased or prejudiced, and accordingly to use peremptory challenges wisely.

In civil cases each party has four peremptory challenges; **I have never seen a challenge for cause.**

In criminal cases, the Crown has four peremptory challenges, but may cause any number to stand aside until all the other jurors have been called. The accused has twenty challenges in any charge of crime punishable with death; twelve in offences punishable with more than five years' imprisonment, and four in other cases. Of course, challenges for cause are unlimited, but I never knew of any but one. I never, but once, heard a jurymen asked a question, and I never knew it to take more than half an hour to procure a jury, even in a capital case.

The above refers to the Supreme Court (civil and criminal), the County Court (civil) and the General Sessions (criminal).

I have already said that any litigant having a claim over \$30 (or \$20 in certain cases) may demand a jury in the Division Court. When that occurs, the clerk takes the "Voters' List" of the municipality and takes, in order, the names of the voters in his division, and not less than twelve are summoned. Each party is entitled to two peremptory challenges, and any number for cause; and the jury consists of five jurors whose verdict must be unanimous. A *tales* may be granted also in the Division Court.



AMERICAN COURTS AS A CANADIAN SEES THEM

RESPONSE TO A TOAST

BY

THE HONORABLE WILLIAM RENWICK RIDDELL

L. H. D., ETC.

OF TORONTO (JUSTICE OF THE KING'S BENCH
DIV'N, H. C. J., ONT.)

AT THE

ANNUAL BANQUET

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MR. JUSTICE RIDDELL: *Mr. Chairman, Your Excellency, Your Honors and Gentlemen:* I desire to begin by saying how glad I am to be with you, and by congratulating you upon the success of this gathering, both in numbers and enthusiasm. I do not say "spirits"—that word might give rise to misapprehensions. I desire particularly to congratulate you upon the eloquence and ability of the speakers who have preceded me.

I am not wholly a stranger in your magnificent State. One very near and dear to me passed many useful years upon an Iowa farm, and your Iowa sod covers all that earth can claim of him. Even without that, I should not consider myself a stranger here, for are we not of the same stock? Do we not speak the same language? Have we not centuries of glorious history in common? In comparison with those centuries, is not that unhappy misunderstanding which separated you and me nationally, but a thing of yesterday? Nay, is not that separation itself but skin deep in comparison with our essential and fundamental unity of race and genius and ideal?

I do not know how an Iowan feels when he puts his foot in Ontario or Canada in general. But I do know how a Canadian, at least an English speaking Canadian, feels when he puts his foot in this Republic and in this State; he feels that he is among very brethren.

I do not propose to speak to you about government—about your forms, notions, and rules of government. If I did that, I fear I should be conspicuous—as conspicuous as my friend, the Governor of Missouri, felt he would be if he spoke to you as a delegate instructed for Roosevelt. I am reminded of the little girl who said to her mother: "Mother, dear, do you think I will go to Heaven?" The mother replied: "Yes, dear, I think you will, if you are a good girl." The girl said: "And mother, do

you think you will go to Heaven?" The mother replied: "I hope so." "Oh, mother," said the girl, "I *do* hope so; I would feel so conspicuous going along the streets of Heaven and everybody saying, there goes the little girl whose mother is in Hell." It feels uncomfortable to be conspicuous, even though you are in Heaven.

I am not going to speak to you about the courts of any particular State. I shall not speak of the courts of Iowa. With your judges and other lawyers I am making acquaintance for the first time. (Mark—I never say judges and lawyers; I say, judges and *other* lawyers—the distinction is substantial.) Your decisions, indeed, are brought before me from time to time for their persuasive effect. I am not going to speak of the judges of Missouri, where I have the pleasure of knowing a number of them; nor of the State of New York, nor any State which is sure Teddy or sure Taft, or Democratic. I shall speak of that State which everybody knows the name of, although it tries hard to remain unknown; and respecting its retiring modesty, I shall speak of it as the State of "Weiss-nicht-wo", as our German friends say.

I have had occasion more than once to visit the courts of that State and have noted their procedure—or failure to proceed—and have been alternately filled with admiration and astonishment, given alternately material for instruction and amazement. The courts of this country are not wholly unlike my own. It is true that the judges of this particular State of which I am speaking are not dressed in suit of solemn black; they have no gown of formal cut; they have no bands of lawn or snowy linen. If they wear a gown, nine chances out of ten, they spoil the effect by tying it with two strings across the chest or by putting a black tie above it. They are not addressed by the bar as "Your Lordship" or "My Lord". It is: "May it please the Court", or "Your Honor"; or sometimes, indeed, "Now, say." It reminds one of the American Bishop who had spent some years in England, and being a Bishop, he was greeted there as "My Lord" and "Your Lordship", till I fear he began to think he was of better clay than ordinary humanity. He came, however, to a sense of his true position when he got home and was met at the station by the hackman's "Hello Bish; got home, have you?"

I like to tell stories about Bishops. There are so few of them that there is very little fear of retaliation, and then it gives a theological and ecclesiastical flavor to one's discourse. It is for that reason—and not at all that it is apropos of anything I have to say this evening—that I should like to tell you the story of the Bishop of Ottawa who once went to a fishing camp. All went well till Sunday morning; when he got up he found nobody around but one man—and he had a sprained ankle. He asked for the rest of the men. He was told they had probably gone fishing. He said, "Why didn't they wait for me?" "Oh," the man replied, "Maybe they kind o' sort o' thought perhaps you wouldn't likely care to go fishing on Sunday." The Bishop said that reminded him of a circumstance, when he was an humble curate. A couple had come in from off the street for him to marry them. When he got so far in the service as to say: "Wilt thou, John, take this woman, Mary, to be thy wedded wife", the fellow broke in by saying, "What in h— are we here for?"

Then there are the barristers—I should of course say attorneys—my excuse is that attorneys do not appear in court in my country. The attorneys are not dressed in this state of "Weissnicht-wo" as at home. They may have pink or yellow boots; trousers and waistcoat of various colors, and a coat, "go as you please". There is no silk gown or stuff gown, no precedence except that given by superior ability or superior assurance.

The witness, instead of being obliged to stand, is seated; in a British court he is never allowed to sit down, unless on account of illness or physical weakness. It is wonderful what an advantage it is for a witness who is trying to evade awkward questions to be allowed to sit down, particularly if he has a chew of tobacco at the same time. But what amazed me most was the selecting of the jury. In thirty years' experience in Ontario I never heard a juryman asked a question but once, and that was by a very young barrister. Once in an American court I heard counsel ask a jury if any were Canadians, there being an Englishman a party to the action. Counsel, I suppose, imagined that a Canadian would likely favor an Englishman, not knowing that a Canadian is no more an Englishman than an Iowan is a Yankee.

I have heard jurymen asked their religion, or whether they had any religion, their occupation, about their reading news-

papers, opinions which they might have formed or not formed, with the minutest and most searching detail; and then perhaps at the very end the jurymen are put on the waiting list to see if by possibility he won't ultimately fill the bill.

The first time I had the pleasure of meeting your President—I mean the President of the United States—while I never talk politics, either at home or abroad, I may be here permitted to say, that President Taft is the ideal, to my mind, of the man, the gentleman, and the lawyer. Whether he has the astuteness which seems to be necessary in this favored land to manage a party is, of course, not for me to say; that, perhaps, will be determined later on. On the first occasion I met your President, I gave him an illustration of the difference between our courts and some other courts. I had gone up to London, Ontario, on the same day upon which, a little further along on the same line of rail, but across the border, they began to get a jury to try a murder case. I had tried four criminals and they were comfortably on the way to the penitentiary; and I had got through with seven civil cases and was home, before in that American city they had secured half the requisite number of jurymen. Indeed, it is not at all uncommon, I am given to understand, that it takes not thirty minutes, but sometimes two weeks (indeed, I have heard it takes sometimes two months) to find a jury. In thirty years' experience at the bar and on the bench which I have had, I never yet have seen it take thirty minutes to find a jury, even in a murder case.

Where a person is charged with a crime, in the State of which I have been speaking, all the old technicalities, rules of the old English common law, are in full force and effect. Those rules which are not the perfection of common reason, those rules which were often the invention of tender-hearted judges, who did not want to hang some miserable wretch just because he had stolen a loaf of bread to still the hunger cry of his famishing brood, those rules which were invented as an excuse for the tender-hearted judge, are in criminal cases invoked and applied every day in this State to which I have referred. Indeed, it would seem, in that particular State, that the prisoner has so many rights that nobody else has any at all, either State or individuals. All the technicalities which an ingenious and subtle mind

can scare up are brought to bear, in order that there shall be not that quiet examination by the people into an offense which it is alleged has been committed against the majesty of the people which is the theory of a criminal trial. Woe to that prosecuting attorney who imagines that the words "against the peace of State", are the same as "against the peace of the State". That extraordinary ingenuity, that uncanny subtlety of the criminal lawyer—I do not mean the lawyer who is a criminal; I mean one who defends criminals—can only be arrived at by a life-long, microscopic study of documents, such as the Constitution of the United States, and of the States; this, as it seems to me at all events, is the only thing which can bring about this cunning, acuteness, and subtlety.

We are told that a very large per cent of the cases tried are set aside by reason of these very technicalities, which should have no more to do with the trial of a case than they would have with the relations between man and man in business. There is no more reason why a criminal trial should not proceed on common sense principles, than there is that a farmer should not cultivate his land on common sense principles. That, however, is what this State of "Weiss-nicht-wo" has not yet arrived at.

Then time is not the essence of a criminal trial in that State. It is all very well in monarchical countries, England or Canada, where we are ground down under the iron heel of the despot, to finish a murder case in two days. I have known in all my experience only one murder case to last more than two days; and in all the cases I have tried, none has lasted over a day and a half. It is all very well in countries where they do not know better: but in this land, if that were the rule, what would the voluminous newspapers do to fill their columns? A ship does not sink every day; candidates for the presidency do not change their politics *every* fortnight, and the great metropolitan newspapers would find it a very cold day if they did not have something to say about a "Thaw".

But, when all is said and done, your courts are familiar and homelike, even in this State. The language is the same, the familiar rules of law and equity are the same and set out in the same language, and applied in the same way. The Latin is the same—I mean the pronunciation. I have said more than once,

that when I hear Latin pronounced in a certain way I may be amongst scholars, but I am certainly not amongst common law lawyers. We have *habeas corpus, nisi prius, fieri facias, venire facias*—mandamus indeed is corrupted into man-damn-us, which affords the lady lawyer some excuse for still further corrupting it into woman-condemn-us.

Then we have counsel trying to catch the wily witness, laying traps here and there, with straight questions and crooked questions, double questions and leading questions; and the wily witness evading, parrying, getting around the queries. We have counsel thundering that the world will come to an end and justice fly from earth if his unfortunate client does not get what he asks, or escapes what the other fellow asks that he shall get. He coaxes and persuades, he almost swears, and does shed tears, crocodile or otherwise. He brings to bear all the weight of eloquence and ingenuity to persuade the jury that his side is the right one. Citizens who until to-day were respectable, and respected, are, if anything, two or three shades worse than Judas Iscariot; while his man, confidence man or other description of rascal, shines by comparison with the Beloved Apostle. He brings the whole weight of his learning, reputation, character, and personality to bear upon the unfortunate judge. Sometimes the judge is persuaded against his will. Sometimes counsel fares like the fellow who tried hypnotism on the butcher. He said, "I tried hypnotism on our butcher to-day." He was asked what luck he had. He answered, "Not much. I looked him straight in the eye and said, 'That-bill-is-paid'." "And what did he do?" "He looked me straight in the eye and said, 'You-are-a-darn-liar'." Sometimes the judge is persuaded, overborne, and convinced against his will, and sometimes, on the other hand, he says, "You are a blank liar."

It is perfectly marvelous to a Canadian, a Britisher, to see what splendid judges you get by a system so repugnant to our public sentiment. They generally are men of great learning, sterling character, and of no little personal dignity. The American judge is noted for his strong sense of justice and right. You have a right to be proud of your judges. Although his term may be near expiring, and although a decision may lose him a re-nomination, or if he succeed in being renominated, may lose him

much support, the case is extremely rare that an American judge swerves from the straight path of duty. So, too, of your bar. Of course, there are black sheep in every flock, but I am well within the mark when I say that the black sheep in the American bar are not numerous, compared with other professions. I admire the ability which you apply to your cases, your determination to think of nothing except your client's right, and determination to win by means consistent with honor. It is said you are worshippers of the golden calf, but I have on many occasions pointed out that we are told, "The laborer is worthy of his hire." Everybody works for money. The doctors work for money. The farmer does not farm for altruistic reasons. The shop-keeper would close his doors if his bills were not paid, and I am reminded of the minister's child, who was asked if her father was going to accept a call to a larger church at a larger salary. "Well," she said, "Father is in the library praying for guidance, but mother has started packing up." All this has been said hundreds of times and still we hear the parrot-cry that lawyers work for money. It is well that we treat the charge with contempt.

But to whom much is given of them much will be required. You and I every day are applying the principles of justice to the determination of the rights of private individuals or corporations, or for the avenging of the wrongs of private individuals or corporations, their rights having been infringed by other corporations or private individuals. We are doing this on the principles of right and justice upon which your forefathers, and mine, for centuries have been willing that their rights shall be determined. Now, is there any more reason why such rights as these shall be determined in this manner than that the rights of nations shall be thus determined? Is there any more reason why the rights of private individuals should be avenged through and by the courts than that the wrongs of nations shall be avenged through and by the courts? Is there any more reason why men no longer should raise the club, sword, and gun in order to get that to which they are personally entitled, than that a nation should do the very same thing? Are we not, my friends, sadly blinded to a great part of our duty? No man is to be allowed to avenge his right by his own right arm, but that is to be left to an

independent tribunal. Why does that rule not apply to a nation? Of course, a national insult makes the blood boil; but does not also personal insult make the blood boil; and have we not learned to keep the blood from boiling? And why, as Christians, should we not learn to do the same thing when our national rights are being infringed upon?

Let me tell you, if the members of the American Bar were united upon this question, marvelous effects would ensue. There is no other body in this great Union so strong as the bar; there is no other body that feels its solidarity like the bar; there is no other body which can be made to move as one man like the bar—and if the members of the bar of these magnificent States were to be as one man in determining that hereafter there shall be no war, the effect would be marvelous. England is a unit for peace. I believe the American people are at heart a unit for peace. My friends, if these two great Nations were to say, “As between us there shall be no war and all troubles between us shall be determined by some judicial body,” the end of war would be very near. Two Nations with such glorious history, two Nations with their keen sense of justice and honor, two Nations like these which fear and need fear no foe, because there is no foe who dare face them—if these two Nations should say, “Hereafter, between us there shall be peace”, then what nation is there, however strong, however proud, which would decline to follow their example?

I ask no treaty, offensive and defensive, between this mighty Nation and that of which I form so insignificant a part. There is that which is stronger than a parchment bond; there is that which is more lasting than ink written by quill or gold or steel; and it is as certain as the path of the planets around the sun that two peoples like these, sprung from the same race, worshipping the same God, in the same forms, with the same language; two peoples who have had centuries of glorious history in common and who love each other and cannot help it, because blood is thicker than water—it is, I say, as certain as the path of the planets around the sun, that these two Nations will stand side by side, if necessary will fight side by side, for truth and justice and righteousness. There is here and there a man in your Nation, as here and there a man in mine, whose ideal is different—

the fool ye have always with you. It is an awful thing to be a fool, and there is no cure for it. We have an occasional ass who likes to pull the feathers from the Eagle's tail, as you have an occasional fool who likes to twist the Lion's tail—but such, and their like, we may pass over. We have a real, living, almost visible Union of which most of us are as assured as we are proud and glad. It is that Union to which I am fond of applying the words of your American poet:

Sail on, O Union, strong and great!
 Humanity with all its fears,
 With all the hopes of future years,
 Is hanging breathless on thy fate!
 Sail on, nor fear to breast the sea!
 Our hearts, our hopes are all with thee,
 Our hearts, our hopes, our prayers, our tears,
 Our faith triumphant o'er our fears,
 Are all with thee, are all with thee.

God grant that day of peace will soon come, and through us, for “Blessed are the peacemakers for they shall be called the children of God.”

THE CONSTITUTIONS OF THE UNITED STATES AND CANADA

AN ADDRESS

BY

THE HONORABLE WILLIAM RENWICK RIDDELL

L. H. D., ETC.

OF TORONTO (JUSTICE OF THE KING'S BENCH
DIV'N, H. C. J., ONT.)

FOR THE

EIGHTEENTH ANNUAL SESSION

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THE CONSTITUTIONS OF THE UNITED STATES AND CANADA

The other day, in a train leaving Toronto I overheard an earnest voice saying "But that can't be constitutional—the Supreme Court will upset that." I at once said to myself, "That is an American speaking"—for in my association with citizens of this favoured land, I have found that a great part of their time and the time of their courts is taken up in the discussion of the constitutionality or unconstitutionality of enactments of their legislative bodies.

In Canada, on the other hand, we very seldom find it necessary to mention the Constitution at all. It is a somewhat curious circumstance that two neighbouring peoples of the same origin, the same tongue and religion, kindred aspirations and identical views of justice and right should differ so much in their conception of a constitution; it is I think unparalleled in history. In the ultimate analysis the difference arises from the fact that the fathers of this Union of States knew how to write; and that having the power, they had that desire to reduce their views to a written form which characterizes the philosopher.

In the mother country, the philosophic students of the problems of politics gave written expression from time to time to their views also—but these students differed from those philosophers in that they had no power to cause their writing to be adopted as a binding document. No more profound studies have ever been made in the theory of government and concerning the balance of function of its various departments than those of Englishmen—but Englishmen could give them only as speculations, they had not the power to have their theories adopted by the Nation at large.

The fathers of this Nation, when they had drawn from English and other sources what they conceived to be the true principles upon which government should be carried on, went further and

formulated their theories in a document framed with much skill: and they had the fortune to have that document declared binding upon not only the Nation as it then existed, but also upon the Nation—speaking generally—as it was to be to the end of time. And this is why the words “constitution” and “constitutional” have such different connotations in the two countries.

In the United States the Constitution is a written document containing so many letters and words—and anything which is in accord with that document is constitutional. In England the Constitution is the aggregate of the more or less vague and uncertain principles upon which the affairs of state have been, and therefore should be, administered. For example, in theory the Sovereign has the right to refuse to assent to a bill which has passed both Houses of Parliament. No Sovereign since Queen Anne has ventured to do this—and the theoretical right is dead as Queen Anne herself. No Sovereign would now dream of setting up his will against that of his Parliament—to do so would be unconstitutional. But there are many parts of the Constitution by no means so well-settled. If five years ago a statesman or lawyer had been asked whether the House of Lords could reject a budget passed by the Commons, he would have answered—“The House of Lords no doubt can, but it will not.” It was thought by many, if not all, that such an exercise of power by the House of Lords would be as unconstitutional as the refusal of the Sovereign to assent to a bill. And yet we know that the House of Lords did recently assert just such a power—and we have not yet heard the last of the results. Apparently the last fight of entrenched privilege in Britain against the insistent demands of democratic freemen has just been fought. In the old land when the question arises, “Is this proposal constitutional?” the answer cannot be given by reference to a document and if necessary to a court to determine the meaning of the document—but it is the electorate who are asked for the answer.

“*Littera scripta manet*”: the American may say, “I stand upon the letter of the Constitution: let the heathen rage and the people imagine a vain thing.”

And does all this not show that the fathers of the Union had not confidence in the wisdom and justice of the people—the elec-

torate? They were not content to leave to the existing or to future generations the power to act contrary to what they—these fathers—thought just and right. If it was not “No doubt but ye are the people and wisdom shall die with you”, was it not perilously near to it? The result is that the people of the United States of America are governed, in part indeed, by the Legislatures elected by themselves, but in no small measure by the hand and voice of the dead.

And this is the essence of what is so often made a boast, namely, that its government is a government of law and not of men. Wherever there is a written Constitution limiting the powers of legislative and executive bodies, there must of necessity be a judicial body to interpret the meaning of the Constitution—there must of necessity be a tribunal to determine the meaning of the document in case of dispute—that tribunal could not well be the Legislature or the Executive itself, but it must be a separate tribunal and could only be a court. The absence of such a tribunal means anarchy—the decision as to the limits of its own power under a written Constitution by Legislature or Executive means tyranny, neither of which the Anglo-Saxon can bear.

In our exemplar Britain, the Parliament is absolutely free. “The power of Parliament is so transcendent and absolute that it cannot be confined, either for causes or persons, within any bounds. It has sovereign and uncontrollable authority in the making, confirming, enlarging, restricting, abrogating, repealing, reviving and expounding of laws concerning matters of all possible denominations.” This statement of Blackstone (Book 1, at page 160) was cited with approval in a decision of my own which was affirmed by the Judicial Committee of the Privy Council, the ultimate appellate tribunal in the Empire: *Florence. &c., v. Cobalt* (1908), 18 O. L. R. 275, at p. 279.

“It is a fundamental principle with English lawyers that Parliament can do everything but make a woman a man and a man a woman”, says DeLolme. “An Act of Parliament can do no wrong, though it may do several things that look pretty odd”, says Sir John Holt, C. J., in *City of London v. Wood* (1700), 12 Mod. 669, at pp. 687, 688. Sir Edward Coke who advanced the proposition in *Bonham’s case*, 8 Co. 118 (a), that “The common law will control Acts of Parliament, and sometimes ad-

judge them to be utterly void" was properly rebuked by Lord Ellesmere, Note in Thomas & Fraser's edit. of Coke's Rep., Vol. 4, pp. 376, 377 (see, too, what Coke says as to the Acts of Parliament against natural equity in Co. Litt, sec. 212). "This dictum once had a real meaning but it never received systematic judicial sanction and is now obsolete. . . . A modern judge would never listen to a barrister who argued that an Act of Parliament was invalid because it was immoral or because it went beyond the limits of parliamentary authority." Dicey's Law of the Constitution, 7th Ed., p. 59, note (1), pp. 60, 61. "The words of the Legislature are the text of the law and must be obeyed", per Hamilton, J. (1911), 1 K. B. at p. 1101.

Nor is there any definite line of decisions in America before the Revolution in the opposite sense.

No doubt the Colonial Courts in considering the Acts of Parliament of the mother country strove to make what they considered to be right and justice override certain of the statutory provisions. But it cannot, I think, be said that any court in the English Colonies went so far as to say that there was a limit set to the power of the home Parliament by any natural or inherent right.

The South Carolina case of *Bowman v. Middleton* (1792), 1 Bay 252, did, indeed, decide that an act of the Assembly passed in 1712, which purported to transfer the fee in certain land from the heir-at-law to another, was null and void "as it was against common right as well as against Magna Charta to take away the freehold of one man and vest it in another." But this decision by no means impugned the power of the home Parliament to do what the Colonial Assembly had tried to do; and is simply in substance a decision that the Colonial Assembly had not the power to repeal Magna Charta.

No other case went so far as to declare any statutes invalid as against natural right—although, indeed, there are many *obiter dicta* which indicate that certain very learned judges held the opinion attributed to Coke. In the case of *Winthrop v. Lechmere*, in 1727-8 mentioned in Thayer, pp. 34 sqq., their Lordships of the Privy Council advised His Majesty to declare an act of the Assembly of the Colony of Connecticut in respect of land of intestates null and void as against the common law of England, but that was to be an exercise of royal prerogative.

The act (30-31, Vic. c. 3) which constituted the Dominion of Canada has in the preamble the following:—"Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdoms of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom". This preamble correctly sets out the desire of the British North American Provinces and correctly indicates the result of the British North America Act. Our Constitution is similar in principle to that of the United Kingdom.

It is true that there are modifications—as there must needs be where more than one body is intended to legislate with absolute authority within the same territory. The Dominion Parliament was intended to have unlimited power (in respect of certain matters) within Canada generally; the Provincial Legislature unlimited power (in respect of certain other matters) within the particular Province. The determination of objects of legislation of Dominion and Province must, of course, be in writing; the division appears in sections 91 and 92 of the British North America Act. To this extent there is a written Constitution for the Dominion of Canada and the courts have been called upon to interpret the British North America Act and thereby to determine the power of Dominion or Province to legislate in respect of some specific matter.

It has been said by an American writer that in Canada the word "unconstitutional" has a meaning corresponding to its use in the United States. This is an error. We use the word in the same sense and with the same connotation as in the Old Land. Careful speakers and writers use the phrase "ultra vires" for "unconstitutional" in its American meaning; "intra vires" for "constitutional".

But while the Dominion and the Province have a restricted list of subjects upon which they may legislate, and they can do nothing outside these limits so set, still when acting within these limits they have "plenary powers of legislation as large and of the same nature as those of Parliament itself." So said the Judicial Committee in *Reg. v. Borah* (1878), 3 A. C. 889, at p. 904. Within the limits of subjects and area the Legislatures are supreme and have "the same authority as the Imperial Parlia-

ment.” *Hodge v. Reg.* (1883), 9 A. C. 117, 132. In a judgment in *Smith v. London* (1909), 20 O. L. R. 133, at p. 137, I put it thus:—“The powers of the Legislature of the Province are the same in intension though not in extension as those of the Imperial Parliament. The Legislature is limited in the territory in which it may legislate, and in the subjects: the Imperial Parliament is not—that is the whole difference.”

And, where the particular subject of legislation is not mentioned in the lists, the Dominion has the power—the residual legislative power, which in the United States rests in the States, is in Canada in the Dominion.

Before speaking of special acts of legislation, I might be allowed to say a word or two as to the Executive.

The head of the United States is elected from time to time. His powers are analogous to those possessed many years ago by the King. He selects his own ministers, and they are his ministers subject to dismissal at his will—it is his policy which they must carry out and they may safely defy public opinion so long as they have his approval. In Canada the head of the State is the Governor-General, or in the Province the Lieutenant-Governor, representing the King; he must, however, take such ministers as the Parliaments say—the ministers must have the confidence of Parliament and the approval of the Governor is as naught compared with that of the House. The King, i. e., the King’s representative, must carry on the affairs of the country through ministers, and he can do nothing himself. If he would dismiss a minister he must find some other minister who will take the responsibility of advising this dismissal and obtain the support of the House in such advice—or if he cannot obtain the support of the House, he must be able to obtain the support of a new House upon an appeal to the country. We do not have the fixed and set periods for the election of our legislators which are characteristic of the United States system. Whenever it is thought advisable by the government of the day to take the opinion of the electorate, the Governor-General or Lieutenant-Governor, as the case may be, will direct an election—or if he refuses to direct an election, he must find an administration who will take the responsibility of advising refusal—and such administration must find support in the existing House—or upon

an election, if that administration goes to the country. It is true that the life of a Parliament is in Canada limited to five or (in the Province) four years—but that is by a statute of Parliament itself, and the same Parliament may extend or shorten the period. It is seldom that any Parliament lives out its statutory life—generally a favourable opportunity offers to take the opinion of the electorate on some more or less important question. No one can tell a month in advance when an election will take place. Then the ministers, who are rigidly excluded from the Legislatures in your system, not only may, but they must, have a seat in the Legislature in ours.

There is a marked difference in the relative importance of the two houses of Parliament in Canada and the two houses in the Provincial Legislatures (where such exist) on the one hand, and the two branches of Congress or State Legislatures on the other. This may be in part due to the fact that members of the Senate in the United States are elected for a limited term, while in Canada Senators are nominated by the Governor-General, i. e., by the administration for the time being in power at Ottawa, and Legislative Councillors who, in the two Provinces which have second chambers, correspond in the provincial field to Senators in the Dominion, are nominated by the Lieutenant-Governor, i. e., by the local administration (we have only two Provinces which have a second chamber in their Legislatures and have found the monocameral system to work well).

It is the House of Commons, the Legislative Assembly, which counts in Canada—the Senate, the Legislative Council, is but the fifth wheel to the coach. The case is rare in which the second chamber ventures to defeat a bill passed by the popular and elected House, this happening only shortly after the advent to power of a new administration of a different party from its predecessor.

If the Senate of the United States were to omit to defeat an administration measure now and then, “chaos (or is it cosmos?) were come again”. In the case of a clash between the houses in Canada the Senate must necessarily give way in the long run to the popular House—not so in the United States where Senate and House alike are elected.

Perhaps the most striking difference in the two systems arises

from the fact that your President is elected for a fixed term, as are your legislators. A President may be universally disliked and distrusted, but short of impeachment there is no way of removing him—with us if the Prime Minister (who and not the Governor-General corresponds in fact, if not in theory, to your President) loses the confidence of the House of Commons he must resign. He may, indeed, if a new election be granted him, succeed in obtaining at such election a majority in the House of Commons: if so he is saved—but he must have the House at his back or step out and make room for another. So in the Provinces in like manner.

I shall now give a few examples to shew how in practice the written Constitutions in the United States have hampered the free action of legislation, with illustrations from our legislation.

The Federal Constitution provides that no State shall pass any law impairing the obligation of contracts—this provision has had far-reaching effects. A charter granted for a college, e. g., is considered a contract. For example, in 1769 the King, George III, granted to the Trustees of Dartmouth College in New Hampshire a charter of incorporation as a private charitable institution. After the Revolution—in 1816—the Legislature of the State of New Hampshire passed an act taking away from the trustees the government of this college and vesting it in the executive of the State—in other words changing the college from a private to a State institution. The act while continuing the trustees as a corporation as Trustees of Dartmouth University, purported to form a new body called a Board of Overseers, of whom the President of the Senate and the Speaker of the House of Representatives of New Hampshire, the Governor and Lieutenant-Governor of Vermont, were ex-officio members—and to this Board of Overseers was given the power of confirming or vetoing the acts of the trustees relating to the appointment and removal of president, professors, and permanent officers, the determination of their salaries, the establishment of professorships, the erection of new buildings, etc. The Legislature later on in the same year passed another act making it an offence for any one to act as president, professor, etc., except in conformity with the act just named. One Woodward had been Secretary-Treasurer of the corporation before the passing of the acts, but he appar-

ently took sides with the Legislature (since he was removed by the Trustees of Dartmouth College before the last act) and he was re-appointed by the Trustees of Dartmouth University organized under the new acts. The old board brought an action against him for taking possession of the books of their records. It will be seen that the simple question was: Had the new corporation of Trustees of Dartmouth University any power? And that depended upon whether the acts of the legislature were valid. The Supreme Court of New Hampshire decided that the Legislature had not exceeded its authority, and so dismissed the action: and an appeal was taken to the Supreme Court of the United States. The case for the old board was argued by the celebrated Daniel Webster and the Supreme Court decided that the charter was a contract. The Chief Justice, the well-known John Marshall, says "It can require no argument to prove that the circumstances of this case constitute a contract." Then the court proceeded to hold that this charter was a contract of the kind protected by the Constitution, and that the Legislature had no right to change it in any way.

In Upper Canada a Royal Charter was obtained from George IV in 1827 for the University of King's College at or near the town of York (now Toronto). It contained provisions that the Governor should be Chancellor, the Anglican Bishop of Quebec should be the Visitor and that the Archdeacon of York should be President by virtue of their offices, that all members of the Council should be members of the Church of England and Ireland, and that students in divinity must also take the same oaths as were required at Oxford. The Legislature of Upper Canada in 1837 took away the visitorship from the Bishop, the presidency from the Archdeacon and abolished all religious tests whatsoever.

That, however, was nothing to what was done twelve years later—in 1849 much of the charter was repealed and amended, the whole constitution was changed, the name became "The University of Toronto", the Chancellor elective, and he was not to be an ecclesiastic, a minister of any faith. The President was to be appointed by the Provincial Administration, the faculty of divinity was abolished, a Senate formed, and the property of the University vested in a new board. No doubt King's

College was a small college and had those who loved her, but no dramatic eloquence even of a Daniel Webster would have induced a Canadian court to hold that the Legislature had exceeded its powers in such legislation. And many such instances are to be found, for example in New Brunswick—"the University of New Brunswick"—in Nova Scotia, and elsewhere. So in the Dominion, but the present year, the relation of the Queen's University to the Presbyterian Church has been radically changed.

In the provision that no State may pass a law impairing the obligation of contracts, "contracts" is considered a very extensive and comprehensive term. When the State of Georgia had granted certain land, this grant was called a "contract" by the Supreme Court (*Fletcher v. Peck*, 6 Cranch 87, 136) and an act of the State Legislature annulling the grant upon the expressed ground of fraud was held to be unconstitutional. In Canada no one doubts that the decision would have been the other way. In 1897 and 1899 certain water rights were given on and near the Kaministiquia River to one J., these were in 1902 taken away from him and restored in 1904—all by the Province of Ontario.

After a State has agreed to grant lands to a company upon conditions, and the grantee has fulfilled the conditions of the grant and so earned the lands, it is not competent to pass further legislation that the lands shall not be conveyed to the company except upon a further condition: *De Groff v. St. Paul & R. R. Co.*, 23 Minn. 144. In Ontario, a certain company claimed to have fulfilled all the conditions necessary under the statute to entitle it to the grant of certain mineral rights. The Government disputed the right of the company: and made a sale of these rights to another company. An action was brought, but pending the action legislation was passed declaring the latter company entitled. The action came on for trial before myself and I declined to pass upon the question whether the requirements of the statute had been fulfilled by the original company, as I considered this quite immaterial. I held that even supposing the first-named company owned the land, the Legislature had the power to take it away and give it to another. This view of the law was approved by the Court of Appeal, and the Judicial Committee of the Privy Council. The following language was used:

“If it be that the plaintiffs acquired any rights . . . the Legislature had the power to take them away. The prohibition ‘Thou shalt not steal’ has no legal force upon the sovereign body”: *Florence v. Cobalt* (1908), 18 O. L. R. 275. This decision made some commotion: and it was attacked by some who should have known better. They based their attack chiefly on the provisions of Magna Charta—not knowing or not appreciating that a British Legislature has the power to repeal even Magna Charta so far as it affects the territory subject to such Legislature—and, indeed, most of Magna Charta is repealed in Ontario: *Smith v. London* (1909), 20 O. L. R. at pp. 140, 141.

An agreement by a State Legislature to bind its own hands by a grant so as to preclude it from exercising its sovereignty in that regard in the future has been held by the Supreme Court to be valid in certain cases of taxation and exclusive privileges. Whether the police power can be thus alienated is a different and a difficult question. But in Canada, “the Legislature has no power to control by anticipation the actions of any future Legislature or of itself”: *Smith v. London* (1909), 20 O. L. R. at p. 142.

I have already indicated the powers of a Canadian Legislature in respect of private property. It may be said broadly that a Provincial Parliament has the power to say that Blackacre, now the property of A, shall hereafter be the property of B—and so it will be—and that without the necessity of making compensation. The whole learning as to eminent domain is of no interest in Canada. The Legislature may, indeed, direct compensation to be paid; but that is in no sense necessary.

In many jurisdictions, e. g., New York, Michigan, Alabama, it has been considered that the State cannot authorize owners of mill-privileges to expropriate the land above to increase the head. In Ontario, we have long had such legislation, and no one has doubted its validity. Compensation is, indeed, directed to be paid: but that is not at all necessary for the validity of the statute.

A statute of New York authorized any person to take into his custody any animal trespassing upon his lands and give notice to the justice or a commissioner of highways of the town, who should proceed to sell the animal after posting notices. This was held invalid in *Rockwell v. Nearny*, 35 N. Y. 307. In Ontario

by R. S. O. c. 272, anyone may distrain a trespassing animal on his land. If this animal be a horse, cow, pig, etc., he may either take it to the public pound or retain it, giving notice to the clerk of the municipality. After certain notices the animal may be sold if not redeemed or replevined.

The State Legislature cannot authorize the compulsory extinguishment of ground rents on payment of a sum in gross: Palairot's Appeal, 67 Pa. St. 479. But in Prince Edward Island, lands which had been in the possession and ownership of "Proprietors" and their predecessors in title for many years were taken from them by the Act of 1874 upon payment into the Treasury by the Government of a lump sum, determined by commissioners. This, indeed, is not unlike "eminent domain", since the act is passed for "the contentment and happiness of the people", and there was "no reasonable hope of" the Proprietors "voluntarily selling their Township lands to the Government at moderate prices."

In Quebec from the first, the land was held in seigniority, the seignior (generally a noble) had under him the *censitaires* or tenants, "habitants" they called themselves: the habitant as "censitaire" (tenant—the words are not quite synonymous) was under many feudal obligations, familiar to readers of Blackstone—for example, he was bound to take his grain to be ground at the seignior's mill, and to pay for such grinding. If he went to another mill, that did not relieve him from paying his seignior all the same. And his punishment might be even more severe, for in one recorded judgment, a habitant who took grain to another mill than his seignior's was decreed to forfeit to the seignior not only the grain but also the vehicle in which it was carried. If a habitant, being the feudal inferior, desired to dispose of the land which he held, he was obliged to pay a substantial part of the purchase money to the seignior; and worse, the seignior might himself take the land within forty days of the sale. He was liable to the *corvée* or forced labor, for his seignior, as in France; he must give the seignior one fish out of every dozen of those caught in seigniorial waters; wood and stone might be taken from his land by the seignior to build or repair manor-house, church or mill. Some few seigniors had also a seigniorial oven to which his *censitaires* were bound to take their bread to be baked.

In 1854 the then Province of Canada directed the value of all these rights to the seignior to be determined by commissioners appointed by the Governor, and upon their report being filed, and notice thereof published in the Official Gazette, the habitant was relieved of all duties, etc., except the fixed yearly rent, and thereafter held his land in *franc-aleu roturier*—at his option he might pay a lump sum once for all.

In this instance all the feudal duties were turned into a money payment—yearly indeed unless the tenant paid a lump sum. No one doubts that when the Legislature said that a lump sum might be paid instead of the *rente constituée*, it was perfectly valid legislation.

In the Imperial Act of 1869, by which the Irish Church was disestablished, there was a provision taking away all right of advowson or power of appointment to a church. Such right becomes effective only at certain—or rather uncertain—intervals—but the Parliament took it away entirely and directed the former owner if he applied for compensation within three years to be paid a lump sum fixed by commissioners: see *Frewen v. Frewen* (1875), L. R. 10 Ch. Ap. 610.

In the United States it is said the Legislature cannot validate an invalid trust or will: *Hilliard v. Paul*, 10 Pa. 81, 326, or give land absolutely to one who under the will received it under a restraint against alienation: *Spink v. Brown*, 61 Pa. St. 327; *Atter's Appeal*, 67 Pa. St. 341. In Ontario Mr. Goodhue left a perfectly valid will, the residuary estate to accumulate during the lifetime of his widow, and directed that if any of his children died during the lifetime of the widow, their children should take their parents' share. This did not suit the children of the decedent: they wanted their share at once and they executed a deed whereby each of them was to have his share at once—in other words they tried to take away the possibility which the will created in favour of grandchildren. The Legislature in 1871 declared the deed valid—and the court was forced to uphold the transaction: *Re Goodhue* (1872), 19 Gr. 366. The court did not doubt the power of the Legislature to pass statutes wherein “from oversight or any other cause provisions should be inserted of an objectionable character, such as the deprivation of innocent parties of actual or possible interest by retroactive legislation.”

Drainage of agricultural lands across the lands of others is a taking of private property for private use and in violation of the Fourteenth Amendment: *Re Tuthill*, 163 N. Y. 133, 49 L. R. A. 781. We have a whole series of acts allowing this very thing, and no Fourteenth Amendment stands in the way.

Not far removed from the right of property comes the right to bring an action. It is said that Congress has no power to protect parties assuming to act under the authority of the central government during the civil war by depriving persons who had been illegally arrested of all redress in the courts: *Griffin v. Wilcox*, 21 Ind. 370; *Johnson v. Jury*, 44 Ill. 142.

The Act of Congress providing "that any order of the President or under his authority, made at any time during the present rebellion, shall be a defence in all courts to any action or prosecution pending, or to commence for any search, seizure, arrest, or imprisonment, made, done or committed . . ." was, accordingly, held to be invalid.

In Canada we have had statutes of indemnity, e. g., in 1838, after the "Rebellion" an act was passed (1 Vic., c. 12) which recited that before and during the "insurrection" it became necessary for Justices of the Peace, officers of the militia and others in authority in the Province, and also for loyal subjects, to apprehend persons charged or suspected of joining in the insurrection. The act then provided that all proceedings brought for such acts should be void, and the persons who had committed them indemnified—all such proceedings were to be stayed, and if the plaintiffs went on they should be liable for double costs. No one had the slightest idea that this act was not perfectly valid.

So in Ireland, a similar act was passed after the Rebellion of 1798; and also in Cape Colony in 1836, 1847, and 1853; in Ceylon in 1848; in St. Vincent in 1862 and in New Zealand in 1865 and 1867. And in Jamaica after the Rebellion of 1865, the Legislature passed an act of indemnity which had the effect of preventing the prosecution of actions against Governor Eyre.

It is, indeed, said that the people of a State, by amendment of their Constitution, may validly take away rights of action and other rights not thereby imposing a punishment or impairing the obligation of a contract. This was done by the State of Missouri

and others; all rights of action for anything done during the war by Federal or State troops were taken away: *Dupman v. Shetel*, 41 Mo. 184; 8 Wall. 645.

Some of the differences between the two countries depend upon a principle to which the courts in the United States pay much respect—the principle of equal rights. One judge exclaims “Can it be supposed for a moment that if the Legislature should pass a general law and add a section by way of proviso that it should never be construed to have any operation or effect upon the . . . rights, etc., of A. L. or J. G., such a provision would receive the sanction or even the countenance of a court of law?” *Lewis v. Webb*, 3 Mo. 326.

The Dominion Act of 1903, 3 Edw. VII, c. 21, gives jurisdiction to the Exchequer Court of Canada to order the sale of any railway at the instance of the Minister of Railways, or any creditor, appoint a receiver, etc., but “Sec. 8 of this Act shall not apply to or authorize proceedings against the C. O. Railway . . . ”

While in cases of succession duties an arbitrary statutory exemption is sustainable: *State v. Furnell*, 39 L. R. A. 170, if such an arbitrary exemption is applied only to estates lower in value while those which are larger have no exemption at all, this is void and invalidates the whole statute: *State v. Ferris*, 53 Ohio St. 34; 30 L. R. A. 218—but this seems to be doubted in other courts: *Tennessee and Massachusetts*, 26 L. R. A. 259; 28 L. R. A. 178. In Ontario, all estates under ten thousand dollars are absolutely exempt—as are all passing to certain relatives under one hundred thousand dollars—and the larger ones have no exemption.

A statute of a State providing for service upon the agent of a non-resident doing business in the State has been held to be void: *Cabanne v. Graf*, 92 N. W. 461. In Ontario, every non-provincial company before procuring a license must have an agent within Ontario upon whom service may be made: and every person who within Ontario transacts or carries on any of the business or any business for any corporation whose chief place of business is without Ontario, shall for the purpose of being served “with writ of summons” be deemed the agent thereof: *Con. Rule 159 (b)*.

A statute attempting to restrict the right of banking to cor-

porations is bad: *State v. Seangal*, 15 L. R. A. 474: 44 Am. St. 756, although apparently the restriction is good if the business be insurance, at least in Pennsylvania: *Commonwealth v. Vrooman*, 164 Pa. 306; 25 L. R. A. 250. By the Dominion Act, R. S. C. (1906) c. 29, Secs., 156, 157, it is provided that every one who uses or assumes the title of "bank", "banking company", "banking house", "banking association", or "banking institution" without being authorized to do so is guilty of an offence rendering him liable to a fine of one thousand dollars, or imprisonment for five years, or both. And only incorporated companies are eligible for authorization.

In the United States, it seems that an act requiring persons paying less than twenty-five dollars in taxes to pay a license fee will be held bad: *State v. Mitchell*, 53 Atl. 887. And a regulation limiting to transients only requirement of a license is equally obnoxious to equality: *McGrand v. Marion*, 98 Ky. 673: *Kinsely v. Cotterel*, 196 Pa. St. 614. But such regulations are of daily occurrence in Canada.

An act providing for raising money to pay bounties to private producers of beet sugar is invalid: *Michigan Sugar Co. v. Auditor General*, 124 Mich. 674. We until this year paid bounties to private producers of steel, pig-iron, etc.—and bounties to private producers of beet sugar are not unknown.

No city, it is said, can be allowed to raise taxes with which to aid manufacturing establishments: *Parkersburg v. Brown*, 106 U. S. 687: *Cole v. La Grange*, 113 U. S. 1. We do it every day and in most, if not all, of the cities and in many of the towns and even villages of Ontario.

In the United States it is decided that taxes must be for a public purpose and while the support of a State University is a public purpose, the creation of free scholarships and allowances to needy students is not, even though these should be granted after public and competitive examination: *State v. Switzer*, 143 Md. 287. We would have no difficulty in such a case.

In Illinois and New Hampshire it seems that owners of property cannot be compelled to keep the sidewalk opposite their property clear of snow: *Gridley v. Bloomington*, 88 Ill. 554; *State v. Jackman*, 69 N. H. 318; 44 Pa. 438. But in Toronto many a citizen has found his way to the police court because he has neglected to obey an ordinance to that effect.

A railroad apparently cannot, with you, be made liable for stock killed by it in the absence of negligence on its part. *Jenson v. Union Pac. R. Co.*, 21 Pac. Rep. 994. By our Railway Act, sec. 294 (4), when any stock at large, whether upon the highway or not, gets upon the property of the railway and is killed or injured by a train, the railway must pay unless they prove that the stock got at large through the negligence of the owner. And sec. 298 provides that the company must pay for damage to crops, etc., caused by fire, negligence or no negligence. Not wholly dissimilar legislation has been passed in several States, and apparently held good. *Fraser v. Pere Marquette* (1906), 18 O. L. R. 589. And also in the case of passengers and goods. *Chicago, &c., v. Qernocke*, 82 N. W. 26.

Some differences depend upon the hypothesis that the Legislature is an agent, *delegatus*: and of course, Bentham or no Bentham, *delegatus non potest delegare*. For example, a State Legislature cannot authorize a board of health to make general rules: *State v. Burdge*, 95 Wis. 390. Nor can it leave to an official finally to determine what shall be done to make factories and workshops sanitary: *Schaezlein v. Cahaniss*, 135 Cal. 466, or the extent of expropriation for waterworks; *Stearns v. Barre*, 73 Vt. 281.

In the Canadian "constitution", Parliament and Legislatures are not considered "*delegatus*" at all. Not even delegates of the Imperial Parliament at Westminster, from whose statute the Canadian Legislative bodies derive their powers—the highest court in the Empire has said "They are in no sense delegates of or acting under any mandate from the Imperial Parliament . . . the Provincial Legislature having . . . the authority to impose imprisonment with or without hard labour, had also power to delegate similar authority to the body which it created called the License Commissioners. . . ." *Hodge v. The Queen*, 1883, 9 A. C. at pp. 132, 133, 134. "It was argued at the bar that a Legislature committing important regulations to agents and delegates, effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them,

are matters for each legislature and not for courts of law to determine", *ibid*, p. 132. In fact it may be said generally that anything a Legislature can do itself, it can depute to another subordinate body to do. I consequently do not give particular instances or further pursue this subject.

Where courts have given an interpretation to the words of a statute, it is not open to the Legislature to put another construction upon these words so as to have a retroactive effect: *Greenough v. Greenough*, 11 Pa. St. 489. No such limitation of the power of Parliament or Legislature is thought of in Canada. Moreover there are many statutes (e. g., in insurance) which are expressly made applicable not only to future but also to existing contracts.

The Legislatures in the United States cannot validly provide that cases pending in the Court under an existing law shall be dismissed: *State v. Adams*, 44 Mo. 570. In 1909 the Legislature of the Province of Ontario passed a statute, 9 Edw. VII, c. 19, which by sec. 8 provided that every action theretofore brought wherein the validity of a certain contract or any by-law passed or purporting to be passed, authorizing its execution by a municipal corporation, was attacked should be "forever stayed." One of such actions came on for trial before me—the evidence had been taken before the passing of the act but decision not yet given when the act was passed. I said (*Smith v. London* (1909), 20 O. L. R. at p. 142) "This action it is plain comes within the letter as well as the spirit of this sec. 8. The Legislature has said that this action shall be stayed. My duty is 'loyally to obey the order of the Legislature,' the action is accordingly stayed.

"While the wording of the statute is that the action shall be 'forever stayed', the Legislature has no power to control by anticipation the actions of any future Legislature or of itself; it may be that this legislation may be repealed . . . the result is that the stay ordered by the statute has the effect of causing the court to retain the action with no proceedings to be taken therein unless and until the legislation is in some way got rid of."

This decision was affirmed on appeal, an appeal hopeless from the very first.

We may go even further and say with perfect confidence that

a Provincial Legislature may, in matters of private rights, oust the court altogether and make it a mere *roi faincant* in that regard.

“It is not in my judgment doubtful that the Legislature of the Province has the power to say that any question respecting property or civil rights shall be decided in any way the Legislature shall see fit . . . that the Legislature has supreme power within the limits of subjects allotted to it to pass such legislation as it sees fit and such legislation must be given effect to by this and every other court. And if the Legislature has in fact said that the true boundary between the two adjoining lots is to be determined by three farmers or by a land surveyor, it is my duty loyally to obey the Legislature and to stay my hand: the Legislature has the legal power—and that is all I may concern myself about—to say that His Majesty’s Court shall not determine the property rights of His Majesty’s subjects . . . but that such are to be determined by some other tribunal or by some person named.” *Delamatter v. Brown* (1908), 13 O. W. R. 58, at pp. 62, 63.

In the case of *Smith v. London* it was held that the Legislature might declare a contract valid which theretofore had been invalid. And this method is frequently resorted to. A municipality has passed by-laws granting a bonus to a railroad or other enterprise, perhaps issued bonds for the amount of the bonus: some question arises as to the legality of by-law or bond issue. An act is procured from the Legislature, and thereafter no one can set up illegality in what the Legislature have declared legal.

The boy said “What mother says is so, if it isn’t so”. We say “What the Legislature say is legal, is legal if it isn’t legal.”

An order to State officers not to engage in politics and not to make public speeches is void. *Lonthan v. Conn.*, 79 Va. 196. Our Canadian practice is to continue a man in public office for life, but if he engages in politics or makes public speeches, he is dismissed, at least when the other party come into power—and no one doubts that such an order as has been held void in the United States is perfectly valid with us.

Then as to the Dominion and Provincial Courts. The construction put upon the statutes of a State by the State courts is generally followed by the Supreme Court of the United States.

The Supreme Court of Canada does not consider itself at all bound by the Provincial Courts. In a case tried by myself in which I gave judgment for the plaintiff, the whole question was one of the interpretation of an Ontario statute—the Court of Appeal for Ontario sustained my judgment. In the Supreme Court, the two judges who had come from Ontario agreed in that interpretation, but three judges—one from Quebec, one from Prince Edward Island and one from British Columbia—took another view, and the appeal was allowed. The Judicial Committee, indeed, restored the original judgment: *Thompson v. Equity Ins. Co.* (1910), A. C. 592; (1909), 41 Can. S. C. R. 491.

But I think I have given sufficient instances now to illustrate the radical difference in many respects of the two Constitutions.

I. In the United States the President and the Governors of the States (speaking generally) have as much power as George III, and in some respects more—the Governor-General and the Lieutenant-Governors, less than George V.

II. Times and seasons are set in the United States for change of legislation, none in Canada.

III. The Government of the United States can claim no powers which are not granted by the Constitution—it is a government of enumerated powers: the Dominion of Canada has all the powers not granted to the Provinces.

IV. The Constitution of the United States contains a hard and fast standard set by people of one generation for their successors: that of Canada may be changed in a day: *Littera scripta manet*.

V. In the United States

The Moving Finger writes, and, having writ
Moves on: nor all your Piety nor Wit
Shall lure it back to cancel half a line,
Nor all your tears wash out a word of it.

(Perhaps you would prefer the Latin version—here it is

It digitus, cerae scribuntur, scriptaque durat
littera: tu sapiens sis licet atque pius
“dimidium dele” frustra obtestabere “versum”,
non fiet lacrimis ulla litura tuis.)

No interpretation by the courts of the meaning of the words of the statutes, can the Legislature correct: no contract created by legislation, however unwise, can be cancelled: no grant, however improvident, can be recalled: no action based upon existing law can be stayed or dismissed: no gain, however ill-gotten, can be taken away from one who obtained it by legal means however scaly: no college can be brought under such governance as the whole State may desire and perhaps need, if it can appeal to some old charter or grant.

In the United States the courts are supreme: in Canada, the people through their representatives—in the one country a few men say to the legislating bodies, “Thus far shall thou go and no further”, in the other the legislating bodies say to the courts, “Thus far and thus shalt thou go and no further or otherwise.”

In the United States, half a dozen men sitting up in a little cock-loft can paralyze the activity of a Senate and House—may say that a measure imperatively called for in the public interests cannot be validly enacted: and the legislators, the people, are helpless—that is called Republicanism, democratic government; and there is searching of soul and shaking of heads, if not gnashing of teeth, when anyone suggests that the people be asked if that little coterie have correctly interpreted the popular will formerly and formally expressed in a State Constitution. In Canada should the court fail to apprehend the real intention of an enactment, any government which can command the support of the people can correct the error.

Paley, when speaking of a view held by some of the Constitution of England, says “These points are wont to be approached with a kind of awe: they are represented to the mind as principles of the constitution, settled by our ancestors, and being settled to be no more committed to innovation or debate, as foundations never to be stirred, as the terms and conditions of the social compact to which every citizen of the State has engaged his fidelity by virtue of a promise which he cannot now recall.” Is not that the point of view, the feeling of the American? Paley adds “Such reasons have no place in our system.”

The framers of the Constitution of the United States have used every endeavor to ward off what they consider the worst

of all governments, an unbalanced democracy which is supposed to be necessarily pregnant with a democratical tyranny (I use the words of Erskine) thinking (to use the words of Locke) "that the people being ignorant and always discontented, to lay the foundation of government in the unsteady opinion and uncertain humour of the people, is to expose it to certain ruin." It is in the power of the people to change the constitution indeed, but not at once—and the "sober second thought" is what is so often spoken of and appealed to. Is it always certain that the first thought is wrong: and the second thought right?

With Burke I say "If you ask me what a free government is, I answer, That it is what the people think so, and that they and not I are the natural, lawful and competent judges of this matter." And so I leave it.

No doubt the citizens of this Republic will say—what a barbarous country is Canada! the courts are not secure in their jurisdiction, the interpretation put upon statutes by the court may be reversed by the Legislature, any man may be deprived of his property without due course of law—why even a legislator after he has been elected does not know how long he may continue such. Surely property must be insecure, enterprise and industry at a discount, the courts an object of contempt, the Government an object of awe not unmixed with terror!! What a country for a white man to live in!

So a Canadian who did not happen to know better might exclaim, Why, what's the use of a Senate and House of Representatives or House of Assembly, when their hands are tied by the letter which killeth, when they cannot even "boss" a court? What kind of a country is it where no matter how offensive and discreditable a government may be you cannot get rid of it till a time fixed beyond control? What a paper-governed, court-ridden country!!

And yet, have we not here an illustration of the saying "It is not so much the form of a constitution as the spirit in which government is carried on, not so much the law as the men who administer it, which count"?

In your land as in mine the government and legislators respond pretty well to public sentiment—a little more quickly, a little more slowly—both lands get the government they deserve. At odd times the courts will with you check for a while useful

legislation, but it gets enacted at last some way or another. A lawyer trained in the interpretation of constitutions—the “Philadelphia lawyer” of proverbial note—can see much difference between “tweedledum and tweedledee”.

A hair perchance divides the false and true.

Yes: and a single Alif is the clue—

They’re sure to find it—to distinction clear

And peradventure to reversal too,

as Omar does *not* say. And a method can always be found without giving the court or the Constitution too cruel a jolt for giving the people what they really demand and insist upon.

In Canada nobody is at all afraid that his property will be taken from him; it never is, in the ordinary case. Our people are honest as peoples go, and would not for a moment support a government which did actually steal—a new government would be voted into power and the wrong righted. We will not submit to have our great public works delayed by cranks or the litigious, but even a crank or litigious person must be paid a full price for his property—our courts I venture to think are as much respected—(excluding myself) are as worthy of respect—as those of any country in the world; many of our best men, men of high type, seek election to the House of Commons and the Legislatures—and if any government in the United States could be treated to more railing accusations and with more contempt than Canadian governments are by their political opponents, I should marvel at it. An American feels himself at home at once in Canada, a Canadian crossing the border does not feel that he is entering a foreign or a strange land—neither can notice any difference in the law any more than in the language or in the habits of the people. Once he escapes the custom-house either feels himself a native—unless he is a fool either by nature or through misplaced or spurious patriotism.

Indeed, we are in all but the accident of political allegiance, one people. True the Union Jack and Old Glory have the colours red, white, and blue differently arranged—but they are the same red, white, and blue.

Of precious blood its red is dyed

The white is honour’s sign

Through weal or ruth its blue is truth,

Its might the power divine.

As we are of the same blood, our aims are the same, justice to all under the law, good will to all men, peace and righteousness. With these aims in common we are working and shall work out our destiny side by side and in much the same way, an example and a blessing to humanity.

THE ADMINISTRATION OF JUSTICE

ADDRESS BY
WILLIAM RENWICK RIDDELL

OF TORONTO, CANADA. BEFORE THE ILLINOIS
STATE BAR ASSOCIATION AT CHICAGO,
MAY 28, 1914

CHICAGO

1914

THE ADMINISTRATION OF JUSTICE.

WILLIAM RENWICK RIDDELL, OF TORONTO, CANADA.

The officers of your Association have paid me the very high compliment of asking me to address you at this your annual meeting; and I can think of no subject of more interest than that in which we are all concerned, The Administration of Justice. And, believe me, I am fully conscious of the great honor you have thus conferred upon me, however unworthy may be its recipient.

I have no intention in what may be said to hold up our methods, our Courts, as an example to be followed, much less to criticise your methods, your Courts or the results you may attain. My remarks will be mostly of a general character; but if there be found anywhere in them aught which will be helpful toward the ends we all have in common, I shall be glad.

It would seem that very shortly before historic times, man lived in anarchy, vindicating his rights and avenging his wrongs by his own strong right hand; when "wild in woods the noble savage ran," he knew no law but his own desires, no master but him who held him by force; everything was to him right that he liked, wrong was what he disliked. The unutterable cruelty and misery of those times may escape the poet, but never the sociologist or statesman.

When man began to be gregarious and formed clans and septs, it was soon recognized that no community could prosper whose only rule was the rule of might, where each was judge of what he was entitled to and was permitted to acquire and keep all he could. The desires of one crossing the desires of another, one must give way or be made to give way—the weaker slain or disabled by the stronger, by so much weakened the community and laid it the more open to conquest and destruction by other communities—while even if matters were not pushed to that extremity, the rankling sense of injustice which corroded the heart of him who had been forced to submit, was itself a deleterious element.

Accordingly it must early have been determined that conflicting interests of two members of the same community must be determined by an independent tribunal. At first, no doubt, the King or Priest—the words were long synonymous—the wise or kenning Elder—was the Judge. For long the Judge received inspiration from the god, not uncommonly the eponymous hero, in each particular case, “every case was treated on its own merits,” and the decision of the god was sought on the particular case without regard to general rule. The litigants receiving the judgment of the god, The Great Master, must needs be satisfied that what was said to them was as the Great Superior wished—He could always say *sic volo, sic jubeo, stat pro ratione voluntas*. Even when the doctrine of special inspiration grew shaky, the judge continued to adjudicate on the particular case before him almost if not quite irrespective of what he had decided in a previous case and with little or no thought of how he might decide in a subsequent, principle being far in the future.

Nor did this wholly cease to be the case when record or tradition gathered the “themistes” which had been pronounced, and a family or order of functionaries, priests—call them what you will—were the guardians of past judgments and considered as entrusted with knowledge of the will of the gods. Something like principle did indeed creep in—something approaching a general rule was gradually appreciated, but still there was not law in our modern sense.

That was practically the condition of the Indian when America was discovered: (it is said “the Indians had few laws but they were well violated”); and it is the condition of many tribes of so-called savages today. It is a great mistake to suppose that there is more litigation in Chicago or in Toronto in proportion to population than there was among the Iroquois or is among the wandering tribes of the desert. The difference is that in these, every law suit is a thing by itself, in those every law suit is connected with thousands of others which have preceded it. There is no satisfactory evidence of the advantage of one method over the other in doing substantial justice.

In ancient Athens principle did not quite make its way, did

not do its perfect work. Much written law there was but more unwritten; and every citizen, every dicast, had his own view of what in reality was the law—in great measure what he wished to be law was law, and he decided accordingly.

It is the glory of the Roman civilization that thence arose the full theory of law as a principle, as a collection of binding precepts. The influence of Roman or Civil Law upon the whole judicial, legal concept of the modern world, it would not be easy to exaggerate.

Our Teutonic ancestors had their own law, cruel, illogical, tyrannical in many respects; but they were inordinately proud of it, and we, their descendants, are by instinct and education prone to look upon it with not much less pride than they.

The history of English civil law for over eight centuries has been in great measure a history of conflict between the crude law of the Teuton and the polished law of the Roman; the more civilized law, with but few set-backs, has been all the while acquiring a greater and greater ascendancy. Now in England and in Ontario, where the rules of Equity and of Common Law conflict, the rules of Equity prevail; the rules of Equity which are practically all derived from the law of Rome.

From the earliest times, the tribunal to decide rights might be of a temporary character and *pro hac vice*, or it might be of a permanent or quasi-permanent nature. In the former case, however disguised, it was in substance a board of arbitration; in the latter, by whatever name it might be known, it was a court. The Court has grown upon the Board as a means of settling disputes, and is now triumphant; and whenever an arbitration is preferred to a Court decision it is a disgrace either to the substantive law, and therefore to the legislature, or to the practice, and therefore in most instances to the Courts—in every such instance the law has proved a failure and the Courts incompetent.

In international disputes indeed the progress just spoken of does not appear. When two nations do not determine their rights by the cannon and bayonet, by wounds and blood and death, by the elimination of their bravest and strongest, “wet eyes of widows, broken old mothers and the whole dark butchery without a soul,”

they have heretofore in most cases formed a temporary Board and left it to the Board to decide without any principle but "Get all you can, give up what you must." Too often it is found that the ape and tiger still survive in that jungle.

Within the nation, we of modern times have decided that our rights must be determined on principle—on principles that can be certainly known, for they can be expressed in writing.

In what I am now about to say, I speak in the main of civil litigation. I shall later on speak of criminal justice specially.

The function of the Court is to determine rights according to principle, that is, according to law; and from one point of view, in so far as it does that, in so far as it is a success and no further.

It is not enough that the Court shall give litigants their rights according to law. The Court was invented to prevent strife by determination of right by and through a just and impartial referee; and unless it is believed that the Court is just and impartial, it fails in a most important part of its object and loses much of its value.

Moreover such a course should be pursued that those who have disputes shall be desirous of having them decided on principle; that is, the superiority of the professional agent of justice, the Court, should be manifest over the non-professional, the Board of Arbitration. The medical profession should feel no more regret at the prevalence of resort to the quack than the legal profession at prevalence of resort to arbitration.

The relative importance of two great ends of the administration of justice, that is, determination of right according to principle, and satisfying the public that justice is properly administered, may depend upon circumstances. In a judgment of my own it was said: "all magistrates should remember that while the most important thing for them is to be impartial and right, it is not much less important that litigants and the public generally should believe in their impartiality and rectitude," *Rex v. McArthur* (1906), 8 O. W. R. 694. Nay, I am not at all sure that it is not sometimes more important that the litigants and the community shall think justice is being done than that the decision shall be strictly in accord with precedent. Not many years

ago, in conversation with a retired Justice of the Supreme Court of the United States, I ventured to express the opinion that no harm would have accrued if two-thirds of the cases in that court had been decided the other way; he answered, "If you leave out the constitutional cases I should agree, and indeed I think you might increase the percentage considerably." The modesty of one not thoroughly acquainted with the Constitutions of the United States and of the States of the Union, one who lives in a country without a Constitution (and likes it), prevented me when speaking to an authority on these, from questioning my friend's exception. I venture, however, here to submit to you the consideration—what harm would have been done if Daniel Webster had failed in the Dartmouth College case? Your law would have been different, but would it have been worse? Is your law better for the people at large—and it is the people it must always have in its care—than if it were as in England and Ontario? Are even your corporations during the sittings of Congress and Legislature any more comfortable than ours or those in England? And after all, has the effect been much more than to oblige legislatures to introduce into private charters a clause reserving the power to repeal or alter them—just as it is said that practically the whole effect of the Statute of Uses was to introduce five words into conveyances?

Did the decisions, or either of them, on the constitutionality of taxation of incomes do any good? and would any harm have been done if they had been the other way? No constitutional amendment would have been necessary, but what of it? Would any one have been injured if he were validly taxed under the constitution as it stood, rather than under an amendment? And does it feel any more pleasant or hurt any less to pay an income tax than if it had been levied under the document of the Fathers?

Did the "Dred Scott" decision settle anything? Perhaps it hastened an inevitable conflict, but did it do more? Was the conflict not inevitable under any decision, and was it rendered less intense, costly, bloody, terrible by the decision actually given?

Most hesitatingly and meekly (as becomes an outsider) I venture to suggest to you that all the decisions of the Supreme

Court are overborne in importance by the one decision of the Senate of the United States when that body refused to dismiss Andrew Johnson; for in all human probability there will never be another impeachment of a President of the United States for the reason that he does not agree with the majority of the people or of Congress; the President is as firmly seated on his throne and is as truly a monarch for the term for which he is elected as any king or emperor in Christendom. Benjamin Robbins Curtis' success before that tribunal was of vastly more significance and of vastly greater importance to the United States and its people than would have been success in the Supreme Court when he delivered the superb dissenting judgment which will continue to be the greatest glory of his name so long as Courts endure and lawyers reason.

Does not the decision of the New York Court of Impeachment that a Governor of that State, their two year King, must behave himself according to their views of honesty and propriety before as well as after his inauguration, overtop in importance the decision of the unconstitutionality of employers' liability legislation? Did this do more than call for an amendment, inevitable if the people wanted it? And what possible harm could have been done had the decision been the other way?

It is the regular and conventional thing to speak of the great principles of the common law as something sacrosanct; to say that the common law is the perfection of human reason. So far as these principles are identical with enlightened reason, with the teachings of the moral law, there can be no complaint. But how do they differ from Justinian's triad? *Præcepta juris sunt hæc. Honeste vivere, alterum non lædere, suum cuique tribuere.* The maxims of law are these, to live honorably, to injure no one, to give every one his due. Any principles outside of these, of what avail are they? And what harm if the rules laid down by the Courts had been different? The laws of real estate at the common law no civilized nation would now endure; in your country and in mine, the Legislature had to intervene so to change them as to make them consistent with common sense. What advantage is it that (or if) the laws of distress by landlord for rent be retained? Who would now lay down the "Rule in Shelley's Case?"

All that has been saved the common law is Legal Fiction, Equity and Legislation; and all our pity for those who did not inherit or adopt the common law of England, your fellow Americans in Louisiana, my fellow Canadians in Quebec would laugh at. Outside of the fundamental principles of honesty, there's nothing either good or bad in law but thinking makes it so; most of our admiration for the sages of the law, Bracton, Littleton, Coke, is as well founded as admiration of the middle age schoolmen and no more so. Extraordinary ability, profound learning, consummate subtlety, characterize both classes; but no one would be much the worse if they had devoted their attention to heraldry or the tracing of pedigrees; or if in eight out of ten cases they found the law diametrically opposite to what they did find.

Howbeit, for good or for ill, the law is in most instances settled; the rights of the people are to be determined according to fixed rules laid down either by binding decision or by legislative authority. The Court must necessarily be conservative; the Court has no more power to change the law as it finds it than to eliminate the word "not" from the commandments; the people are entitled to their law as it stands and must submit to it whether they like it or not. We probably all agree that (speaking generally) the very first consideration underlying, surrounding and going beyond all others, is that justice shall be done according to the existing law. If the people do not like the law let them change it, the Court cannot change it for them.

God forbid that any Court should be influenced in its judgment by the opinions of litigants or of any other person whomsoever. Circumstances may and often will be such that judgments will not only be unpopular, but they may even be repugnant to the sense of justice of the community; and yet the Court must give precisely these judgments.

But that does not imply that the Court should so act as to give rise to the impression among the people that it is wholly indifferent to a just public sentiment. Lord Mansfield could say: "I wish popularity," and he showed himself a good public servant when he said so, if a better when he added, "but it is that popularity which follows, not that which is run after, it is that

popularity which sooner or later never fails to do justice to the pursuit of noble ends by noble means. * * * *'Ego hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam putarem.'*" (I have always been of this opinion—that unpopularity gained by doing one's duty is a glory not a disgrace.)

Now justice is not administered in the abstract, it is justice to the litigant in the particular case that must be sought; and the one essential of a Court is that the law is administered in the particular cases brought before it.

A story is told of an importer who had been required to pay \$800 as duty upon goods which he had brought in. He claimed that no duty was payable, and paid under protest. He brought his action which made its way by slow degrees to the Supreme Court. In that Court all the Judges gave learned opinions, but none said whether the unfortunate merchant was to have his money returned, and the Court was shocked to hear a troubled voice, "Do I get my \$800?" *Se non è vero, è ben trovato.*

The Court is not (at least in my country) the master of the people, but their servant, supported by them for their own use and in their service; the judge is paid by the people to do their work, and just as soon as the Court is not worth, directly or indirectly, what it costs, it should be abolished—directly in adjudicating upon the rights of litigants, indirectly in preventing civil wrongs, turmoil, assaults, thefts, trespasses, in the time-honored phrase "maintaining the King's peace."

A Court does not exist for itself; it is not an end in itself. A Court is an evil and the less it is called into play the better for the community unless the evils arising from this course will be greater than those arising from the more frequent exercise of its functions.

When Congress was proposing to give American coasting vessels a privilege in the Panama Canal not granted to other ships, and Britain made a protest, basing her claims upon treaty (I am not going to discuss the rights and the wrongs of the matter, the American people are guardians of their own honor and need no advice or opinion from me or any other non-Amer-

ican), my friend of the United States Supreme Court said to me: "I hope that question will go to The Hague." I answered, "I hope not;" and when he wonderingly asked why, I said, "I hope there will be no necessity, I hope that the nations will settle the matter without litigation, there is no saying what heart-burnings and discontents may arise over the decision; we in Canada still remember the Alaska Boundary Award, and no one has a right to expect a repetition of the extraordinary good fortune which followed the Fishery Award at The Hague the other day when each party claimed substantial victory. A settlement between the parties themselves is infinitely to be preferred to a reference or litigation of any kind." My friend was not wholly convinced; he was an American and consequently thought that "there is nothing like a court."

The court was made for man, not man for the court. No considerations of dignity, tradition, *esprit du corps* should ever induce a judge to forget that he is a servant of the people, paid by the people to do the people's work—if he fail to appreciate this elementary truth and to act upon it, he is apt to be an unfaithful servant, a dishonest recipient of wages paid for work which he fails to do. Fortunately this class of judge is rare; there is no "I Won't Work" associations for them.

The Court does not exist for the exhibition of the personal dignity of the judge. Personal dignity in a judge may be a valuable asset to the community which he serves, it may help to preserve decorum and thereby advance public business; but it may be a detriment if of a certain kind. If the back be so stiff that it cannot bend itself to work, and if the business of the Court must be delayed because the judicial dignity craves twenty-three hours rest of the twenty-four, the public can very well manage to get along without it. And the dignity which is so concerned with looking for slights and "contempts of Court" that it has little time for anything else, is better placed elsewhere than on the bench. Let a judge do his work faithfully, promptly and courteously, and his dignity may generally be left to look after itself.

Tradition is sometimes of much value; but it is tradition of what is good and useful; a traditional method of doing busi-

ness is convenient and not infrequently is the best available method; but a tradition, if there be one, of dilatoriness or inefficiency were better forgotten. What is old is not necessarily good, nor what is new, necessarily wrong.

Perhaps the most frequent complaint made anywhere of the administration of the law, is its delay—the law's delay. One of the promises wrung seven centuries ago from a reluctant king by a resolute aristocracy, was *Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam*; to none will we sell, to none will we deny or delay right or justice. He who delays justice, denies it—a truth profound though it lies on the very surface, patent and obvious, so patent and obvious indeed that it is often overlooked.

A very short time ago I read an able article by an eminent judge of one of the United States, in which he said that delay if not too long is a good thing in litigation. I then absolutely repudiated that doctrine, as I do now; I assert most confidently that every unnecessary delay is wrong if not asked for by the parties concerned. The ideal method of determining rights would be for the parties when difficulties arose, at once to lay the facts before a judge and have an immediate decision. We in Ontario have that method in substance where there are no facts in dispute but the only question is the interpretation of a written document whether will or contract. This cannot always be done, there are generally in dispute facts upon which the rights depend; and these facts must be determined in some way. The very speediest method of bringing them to a determination consistent with thorough investigation is the best; and a litigant has a legitimate ground of complaint if there is a day's delay beyond the time really necessary.

Delay in bringing a case to trial may be due to the people themselves; their representatives may not have constituted a sufficient number of courts, elected or appointed a sufficient number of judges; or they may have clogged the courts by an intricate and dilatory practice. In that case the people cannot complain; they have the courts and the practice they deserve. If they want something better, let them do something better. It is idle

whining about an evil which is due to one's self and one's own negligence or indifference; "whatsoever a man soweth, that shall he also reap."

The delay may be due to a vicious practice which the courts have the power to change for the better; in that case the courts are derelict in their duty if a change is not made. Not rashly—changes in well understood and well established practice are not lightly to be made. I have no high opinion of the "wisdom of our forefathers"—they were probably much the same manner of men as those of the present time, and "there is a great deal of human nature in man;" but any institution that has stood the test of time and fairly well fulfilled the object of its being, deserves to be treated with respect even by our non-reverent generation. Still everything must give way to the public good, reverence for antiquity included.

Speaking generally, if either litigant cannot compel the trial of his case in six months from the institution of proceedings, there is something wrong, and he has a right to complain. There may, of course, be trouble in locating witnesses and procuring their attendance, there may be intricate and protracted experiments to be made, or other causes for delay, but in the general case no want of a sufficient number of judges, no intricacy of practice, no skirmishing of lawyers, should prevent the trial of a case within the time I have mentioned.

It is a matter of the most profound astonishment to those of my Province to see the great delay to which some of the States of the Union submit; our people would not stand it for a year, there would be such an outcry in the press and elsewhere that no government would refuse to bring in, no legislature refuse to pass, amending and corrective legislation.

How is a case to be tried?

There may be constitutional provisions which must be obeyed or the legislature may prescribe. In Ontario there are very few cases in which a jury is of right; in most instances the presiding judge is master of the situation, he may try a case with or without a jury as seems best. At Toronto in 1913, in the lowest court, the Division Court, not one per cent were tried

with a jury.* in the next higher, the County Court, 18% were tried with a jury, and in the Supreme Court, 26%. In most of these cases the jury were not allowed to find a general verdict but were confined to answering certain questions of fact submitted to them by the judge, he reserving everything else to himself. In more than thirty years' experience I have known of only two appeals against the action of a trial judge in striking out a jury notice—both unsuccessful.

The saving of time—and wind—is enormous. The opening and closing speeches of counsel to the jury and the charge of the judge are done away; in argument there are very few judges who care to be addressed like a public meeting and quite as few who are influenced by mere oratory—all indeed must *ex officio* be patient with the tedious and suffer fools gladly. Vehement assertion, gross personal attacks on witnesses or parties, invective, appeal to the lower part of our nature, are all at a discount; and in most cases justice is better attained, rights according to law are better ensured. Moreover during the course of a trial a very great deal of time is not uncommonly wasted in petty objections to evidence, in dwelling upon minor and almost irrelevant matters which may influence the jury, wearisome cross-examination and reiteration, etc., all of which are minimised before a judge.

But it is never to be forgotten that the courts belong to the people, and the wishes—even the prejudices—of the people must be borne in mind. If for any reason the body of the people were to come to the opinion that a judge trial was not a just trial, justice would not be satisfactorily administered if that form of trial were adopted. There I leave the matter.

Very often during the course of a trial, facts will come to light which give a new turn to the case; some courts are so hampered, or so hamper themselves, that they cannot go outside of

*The official report of the Inspector of Division Courts for 1913, just to hand, shows that in 1913 the total number of suits entered in these Courts in the whole Province was 63,675, and the number of juries called for 117, a little less than one-fifth of one per cent. The whole amount claimed in the suits brought was about two and a half millions; the cost of the juries averaged a few cents over \$10.

what the lawyers have already put on paper; they cannot "amend the pleadings," and great injustice may result. Whenever by any hide-bound practice a court cannot do justice on the facts because a lawyer has made a mistake, there is a failure in the elementary duty of the court. In the ideal state, every liberty will be given to both parties to bring out all the relevant facts, and judgment will be given on those facts according to the very right and justice of the case even if lawyers make fifty mistakes and a hundred omissions.

Law is not a game where the smartest man wins, it is a serious attempt to determine rights no matter by whose mouth or with what ingenuity—or want of it—they are asked.

The courts are sometimes said to have as their function the making of good lawyers. Perhaps so, but just as one function of a hospital is to make good doctors—a mere by-product of an institution whose primary and fundamental object is to heal the sick—so while that of the court is to give a litigant his rights, there can be no harm in the by-product of good lawyers. There can be no harm in a doctor learning while he is practising in the hospital, but the doctor who puts in the fore-front anything but the cure of the particular patient entrusted to his care is derelict in his duty, recreant to his profession. Comparison with this of the duty of a lawyer is obvious; the place to learn law is the law school and the library, the court is a place to do business in, to determine "Do I get my \$800?"

I almost tremble when I suggest that the "good lawyer" of popular conception is no great acquisition to the community any way. Let me not be misunderstood. I pity the lawyer who knows nothing else than the daily routine of a law office or a court, who has become a mere tradesman, handicraftsman; but just as I pity the student at the university who reads only enough to pass on. Law is a liberal and a learned profession, and there are very few fields of knowledge which may not be of advantage in enlarging the mind and understanding. Even deep reading in the older authors will do no great harm if care be taken not to fill the mind with antique views to the detriment of common sense, what I have frequently described as "cluttering up the mind with law." The fact that law is a learned profession does not

diminish the significance of the fact that the lawyer is a business man, hired to do his client's business.

A well educated Bar is a great desideratum; a self-respecting Bar is of great value—a Bar, which never forgetting the rights of the client, does not think it inconsistent with duty to assist justice by courtesy to opponents, by civility to witnesses and others, by respect to the court, by a due regard to the exigencies of public business. The noisy showy barrister, who plays to the gallery, seeks to impress his client or the populace with his ability and importance by discourtesy to others, insolence (more or less veiled) to the court, interminable oratory to the jury, is an evil, a public nuisance. That class will always be met with where the people want it. No one can expect total self-abnegation and disregard of his own interests even in a counsel; and “for people who like that sort of thing, that is the sort of thing they like.”

What about appeals?

The ideal method would be for the losing party to take all the evidence, papers, etc., in the case, at once before the appellate tribunal, and, both parties being heard, the case to be disposed of without delay. The nearer the practice is assimilated to that ideal system the better, other things being equal. The Appellate Court should, if required by the amount of business, be continuously in session with only such intervals as are necessary to consider the cases presented. The material before the Appellate Court should be all the material in the trial court; this should be got before the Appellate Court at the earliest possible moment and with the least possible expense; the proceedings should be as little technical and complicated as possible, and in this court as elsewhere justice delayed is justice denied. Of course there will often be circumstances causing delay, there may be facts alleged or statements made at or after the trial which must be investigated; people will die and even the counter-irritant of a law suit will not always keep them alive. Leaving aside special circumstances and speaking generally, if a losing litigant cannot have his appeal heard and disposed of in three months from trial there is something wrong. In a certain country, a Chief

Justice declined to sit in an appeal because judgment might not be given before the expiration of his term, more than three months distant: that fact and the circumstance that it excited no astonishment will furnish their own commentary.

Moreover there are often trifling errors (generally against technical rules) at the trial; even judges are not exempt from the imperfections of humanity. An Appellate Court should pay no attention to such defects unless some injustice results. There may be some fact left unproved or later discovered. Why should not the Appellate Court allow the fact to be proved before itself? What is the sense in sending a case down for a new trial with all its risks, expense and trouble?

There is one failing with which courts of appeal are very frequently afflicted; they are apt to forget that the main object of litigation is the determination of the rights of the litigants before them, and to imagine that what they are for is to write dissertations on the law. To a lawyer, there is no stronger temptation than to follow up a point suggested in a case and to exhaust the law on such point, although it is not really material in the case under consideration. There can be no objection to that course, but it should not be followed so as to delay a decision unduly and thereby deprive the litigant of his right to speedy justice.† What is important is, "Do I get my \$800?"

†I produce to you the list of our Appellate Division, the Court of Appeals in Ontario, for the May, 1914, sittings.

There are eighty-one cases on the list. The judgments from which these appeals are taken were delivered as follows:

Before January 1, 1914.....	7
In January, 1914.....	5
In February, 1914.....	14
In March, 1914.....	44
In April, 1914.....	11
In all.....	81

Of those before January 1, 1914, two are cases of a Municipal Street Railway which is being reorganized, and all parties desire time to complete the financial arrangements. The parties have

had several opportunities to argue the appeals if they so desire, and the cases are kept on the list *ex abundanti cautela* for fear the arrangement may fall through. Three others have stood by arrangement of counsel; and one to enable the appellant to procure a preliminary order from a county court judge, *persona designata* under the statute. All of these have had at least one chance to be argued. The seventh is a case *sui generis*. A wife is suing her husband and conducting her own case. Two motions have been made by the defendant to dismiss the appeal for want of prosecution, but the court has extended the time. Much of the evidence at the trial is said to be irrelevant, and the plaintiff is finding difficulty in extracting what is material. She scorns professional help and is perhaps looking for a grievance. At all events we thought we should not cut her out of an appeal.

Of the five decided in January, 1914, two were delayed by illness of counsel, and counsel on the other side agreed to let the cases stand; two by reason of omission of stenographers to get out evidence in time; and in the fifth, counsel mislaid his papers and the other side consented to delay. All these have had at least one chance.

We do not allow cases to stand from month to month without inquiry. From time to time all cases looking stale are called on to be spoken to; and if the reporters are found derelict they are brought to time. If the parties are not really intending to go on with the appeal promptly, it is dismissed.

During the May sittings all the appeals from judgments delivered in January, 1914, have been disposed of; of those before January, the two about the Street Railway still stand; one other will be disposed of June 1, another June 5; all others have been heard.

There have been added to the May list 3 cases in which judgment was given in March.

We have heard

Of those in February, 11 leaving 3

Of those in March, 35 leaving 12

Of those in April, 9 leaving 2

In addition to those fully heard, two involving disputes

between the Municipality and private individuals have been heard in part and stand for a proposed settlement.

And what law should be administered?

Most of the English-speaking peoples have the tradition of the fundamental distinction of Law and Equity. This distinction is historical and arose from our ancestors having a law of their own of which they were inordinately and stubbornly proud and tenacious, "*Nolumus leges Angliae mutare*" said the barons on a memorable occasion; and *nolumus leges Angliae mutare* they continued to think (some indeed consider that the barons have not ceased to be intensely conservative even at the present day). The gross and palpable injustice done by these venerated *leges Angliae* became intolerable, and after legal fiction had failed to permit justice to be done in the law courts, Equity was invented. "Equity mitigated the rigor of the common law" is the conventional and euphemistic way of putting it; but this cloaks the infamies which the common law enjoined or permitted. The lawyer was not till comparatively late entrusted with this new weapon; the churchman was the early chancellor. But it got at length into the hands of lawyers and became as technical and as formal as the common law whose rigor it was to alleviate. These two systems of law ran along side by side, administered by different courts for centuries, and the English lawyer came to think that this division subsisted in the very nature of things.

It is hard to dislodge inveterate and traditional opinions even when they are wholly without solid foundation. The colonial lawyers raised on English precedents as pabulum, absorbed the English idea and it stuck. I have before me as I write a letter on the subject of the Courts of Law of Upper Canada addressed to the Attorney General and Solicitor General in 1847. This was written by a member of our bar of the highest standing, one who was afterwards Chancellor and then Chief Justice of Ontario. Addressing the "Chief law officers of the Crown for Upper Canada upon a subject interesting alike to the profession and to the country—the due administration of justice," and at a "time when changes appear to be contemplated in some of our Courts of Justice," he argues that "law and equity ought to be

considered as distinct systems, and that they are so considered and kept apart in England, is, perhaps, one of the best provisions of our Constitution." He approves the statement of Lord Eldon as to "the necessity of that separation of Courts of Law and Equity which so mainly contributes to the complete and effectual administration of justice to an extent and in a degree such as are unknown and must be ever unknown where that separation is not effectually made and observed." In Upper Canada we had got along without a Court of Equity till 1837, and there was in 1847 talk of getting rid of it. Mr. Spragge (the writer spoken of) deprecates such a course, disputes the statement of those who say "we did very well without it before the Court of Chancery was established," for, he says, "the common law was never meant nor is it calculated by itself to form the jurisprudence of a country. Without being tempered by equity law, it would often work injustice, and in its actual operation in this country the application of its rules did work injustice until a language began to be used in our Court of King's Bench which would have sounded strangely in the ear of a common lawyer in England." He thinks that without separate courts "the law * * * would degenerate into an uncertain hybrid system neither common law nor equity, but an incongruous compound of both, so that no man could tell what his rights are." "We must * * * have English law, a combined system of law and equity, or we must abrogate the English law, throw our whole system of law to the winds and adopt the civil law. But were so mad a scheme proposed methinks Upper Canada would answer as with one voice *nolumus leges Angliæ mutare*." This reasoning was adopted, and as at the Parliament of Merton so at our Canadian Parliament "*Omnes comites et barones una voce responderunt quod nolunt leges Angliæ mutare quas hucusque usitatae sunt et approbatae*."

If any lawyer were asked to lay down a code of laws for a new community he would be thought insane if he laid down two codes, one of laws to govern the people and another, to modify and to that extent to nullify the first; and yet because from historical reasons that system grew up in England, many lawyers thought it a necessary system. Even in 1847, some could not

conceive of the legislature combining the two systems into one, and directing the fused system to be applied in all courts. And so we had law and equity for over thirty years longer. In 1881 when a simple provision was made that where the rules of law differ from the rules of equity, the rules of equity shall prevail, and this was applied to all courts, many were the mournful laments for the departed glory of our jurisprudence. Rachel weeping for her children could be as easily comforted as the "equity lawyer" when he found that a proceeding to foreclose a mortgage could be taken by writ in the Queen's Bench Division, or the purely common lawyer when he found that the beloved principles of the common law were ruthlessly subdued to the alien rules of equity. I have myself heard a practitioner, still living, curse what he called the "confusion" of law and equity; but time is the great assuager of grief and the change has vindicated itself. No one now would think of going back to the old system.

This fusion of law and equity has had something to do with the gradual decay of the jury system.

A word or two as to the administration of criminal justice.

The abominable cruelty of the English law, whether the common law as interpreted in early times by the high placed judge or made in later times by the high placed member of parliament for the governance of the lower classes—in either case a mandate in the vast majority of instances of the superior to the inferior—revolted the humane. Rules were extended or invented to save the shedding of blood for petty or even serious offenses. The law was brutal, and its brutality was mitigated or evaded by the ingenuity of less blood-thirsty judges. Trifling defects, errors of form, omissions to prove immaterial allegations, matters of no importance whatever were laid hold of to prevent a judicial murder. Consequently the result of a prosecution became very much a matter of chance; criminals looked upon a verdict of guilty as a bit of bad luck. A chaplain of Newgate of the time has left an awful account of the view taken by prisoners of trials, an account which haunts the reader as a horror for years.

Accordingly, the prosecution of an alleged offender became

a kind of sport. The prisoner had so much of a start, so many proceedings were forbidden to his pursuers, he might double and dodge, and in the end, in spite of facts wholly proved, might escape. It was a kind of glorified fox hunt, the quarry having a much greater chance than a fox.

This was about the condition of the law in England when the United States branched off and when Upper Canada was given legislative independence. Both took the law with them. The rights of the accused, the protection of the accused, gave the watchword; and some courts have not forgotten it yet. In not a few courts the prisoner has so many and so sacred rights that no one else has any, the State included. Instead of a criminal trial being a solemn inquiry by the State into a crime alleged to have been committed against it, a criminal trial is apt to degenerate into a game, a play, a spectacle for the curious and a subject for lurid newspaper writing. That provision made by the State for its own protection that no one shall be punished unless and until convicted by a competent court is made a cloak to shelter those who have undoubtedly committed crime; the pettiest of all petty technicalities are invoked as though they were the most profound of principles, on the violation of which the heavens should fall. Time seems not to be considered of importance in many jurisdictions; and in one the members of the bar say openly that a conviction for murder is but the beginning of the criminal trial.

Solemnity and formality in a criminal trial have great influence upon the criminal classes. Severe punishment has not at all the same deterrent effect as certain and speedy punishment. Many a degenerate or wilfully wicked person would be willing to be made the central feature of an eight days' or eight weeks' show with a good chance of evading punishment.

Is all this good for the State?

Once again, if the people really want that sort of thing they must have it; but do the people really want it? Of course the criminal classes, the potential criminal, the lawyer who is paid by the length of time he can make a case last or who seeks glory from technical ingenuity or florid rhetoric, the yellow and near

yellow paper and its readers, all are in favor of it. But the man who has to pay for it, the sober-minded citizen who takes an interest and a pride in his country, who is jealous of her honor and reputation—what of him? and is he not to be considered?

If a criminal trial is a game, well and good. The fox hunter who was expostulated with on the cruelty of his sport said, "The men like it, the horses like it, and nobody can be certain that the fox does not like it." But even fox-hunters pay for their game out of their own pocket, and if a fox does get away now and then, there is no great harm. We in Canada are too poor to be willing to pay for such a sport and too busy to be willing to waste weeks on an investigation for which days or even hours are ample. We think that except in very grave offenses, such as murder and the like, an accused should have the option to be tried by a judge and without delay, instead of waiting for a jury sittings. If one charged with crime be desirous of trial by jury we allow him a copy of the jury panel in sufficient time to make inquiries as to any objection to the jurymen, and when a trial is set we insist on it being proceeded with, with due diligence and reasonable speed. The first time I met your ex-president, Mr. Taft, he spoke of the intolerable delay in criminal trials in the United States. I told him that a short time before, I had gone to a Canadian city to hold the Assizes on the same day that a few hours further along the same line of rail but across the international boundary, a judge began to get his jury in a murder case; that I had tried four criminal cases and seven civil cases, and was home in Toronto before my American brother had half his jury. I told the New York Bar Association that in my thirty years experience I never saw it take more than half an hour to get a jury. Let me add that I have never but once heard a proposed jurymen asked a question about reading newspapers, forming an opinion, or anything else. I have never known even a murder case (except one) take four days; very few indeed take more than two; none tried before me has taken as much as two full days; and medical or other experts are not allowed to drag out proceedings. We think four on each side enough except in special circumstances and we keep these well in hand.

Is fair play not the only natural right of one accused of crime? It may be that in some courts the proceedings are protracted by the gladiatorial spirit. The prosecuting counsel feels that he has a brief for conviction and that he is vanquished and disgraced if he fails in procuring it. He strains every nerve to that end, stretches the law and colors the facts; and if, *per fas aut per nefas* he hears the jury say "Guilty" he is triumphant. I venture to think that that theory and the practice based upon it are wholly vicious and debasing. In an investigation by the State into an alleged offense against itself, the counsel representing the State has the plain duty to investigate; and the State not desiring that an accused be pronounced guilty if in fact or in law he is not, it is the plain duty of the prosecuting counsel to bring before the court and jury all the facts and all the law—what helps as well as what incriminates the accused.

The wholly brutal system of the judge being the most determined and effective prosecutor has long gone out; the only excuse for it was that not seldom the judge had been the investigator and had become certain of the guilt of the accused. Howell's *State Trials* are appalling reading at the best; and a judge who would act now as the most venerated of the sages of the law acted in the past would be cursed and despised of all men.

Has not the spirit of these judges descended to some prosecuting counsel?

In Canada, the theory is that the Crown Counsel represents the State. He has no concern with whether the accused is found guilty or not. His whole duty is performed when he has brought out all the facts by direct evidence or by cross-examination of witnesses for the defence and has summed up to the trial tribunal fairly all the facts. If the judge or, in case of a jury trial, the jury think no case has been made out, that is no concern of his; he is not to blame. Of course, human nature is human nature. Counsel will instinctively want to fight the counsel on the other side. It is difficult to be impartial, particularly when one has a strong conviction of the guilt of the accused; but if counsel wilfully concealed or failed to bring out facts favorable to the prisoner's innocence, if he unduly pressed for a conviction, if he were to urge

unfair arguments to the jury, he would lay himself open to unfavorable comment of his professional brethren and the public, as well as to stern rebuke by the trial judge. The method of candor and fair play brings more convictions than the opposite course. A jury like fair play, and if they see a prisoner is not getting it, they are not at all unlikely to feel resentment and to "help the under dog." I am an old Crown Counsel, and I speak whereof I know.

Speed is called for in an appeal in criminal matters. The deterrent effect of punishment varies inversely with the delay in punishing; while if there is to be a new trial, it should be as soon as possible, witnesses disappear or "forget" more quickly and effectively in criminal than in civil matters.

Punishment should follow swiftly; we think, in the Dominion if a Canadian murderer is not hanged within a year of his crime he is justified in complaining of being deprived of his just rights given him by *Magna Charta*.

There is abroad in some quarters a feeling of unrest and dissatisfaction with the administration of justice, civil as well as criminal. It will not do to say that this is due to machinations of demagogues, to the ambition of politicians out of office. No demagogue or dissatisfied politician can long make any considerable number of the community believe in what has no foundation in fact. The causes of dissatisfaction should be sought out and if possible removed.

Some part of this may be due to a misunderstanding of the true function of the court. It seems impossible for some, and those not the most ignorant or least American, to understand that the court does not make the law. Just as it is said we have in our bodies remains now dormant and useless, even harmful, of organs which were alive and active in the reptile stage through which we are told our race has come, so there is away down in many minds the relics of what was real when the early judges laid down the law to suit themselves. As the nightmare which frights the bravest before a danger which does not exist is said to be a reminiscence of the terror of the ancestor, the naked savage running through the dark forest of old, fleeing a very real

danger, so the present nightmare—if it is right to call it a nightmare—may be, at least in part, an atavistic reminiscence of what was once a grim reality. It may be that means can be found and used by the Bar or others to correct such misapprehension.

But is that the only reason? Of course substantive law is for the legislature, but there are many ways in which the Court can do much to make the administration of laws accord with the requirements of the people.

Conservative, Courts must needs be from their very constitution, but that does not imply that they must be unsympathetic to any suggestion of improvement or grudging in giving full effect to amendatory measures, permissive or imperative. Dignified they should be, but that does not imply *otium cum dignitate* with *otium* ninety-five per cent of the prescription. Deliberate, too, but that does not mean so slow that before judgment is given the litigant is dead or hope deferred has made the heart sick. Independent of public opinion every judge must be, but that is not synonymous with indifference to the manner in which the public receive his judgments and the opinion the people have of his honesty. Like Lord Mansfield, while he should despise the popularity that is run after, he may well prize that which follows. He is called upon for imperative public reasons to avoid the very appearance of evil and see to it that nothing in the manner of his judgments is unnecessarily offensive to his fellow-countrymen, however unpalatable the matter may be. That judge received no commendation who, while he feared not God, neither regarded he man; and no judge may use the oburgation, so well known as attributed to a multi-millionaire, “the public be damned.”

The position of a judge is one of the very highest to which a man can be called in a free country; the influence for good of an upright and conscientious judge is incalculable; and when he exhibits defects of manner, lack of prudence and decorum, contempt of the commonalty, he grieves the judicious and does as much or nearly as much harm as if he were ignorant of law, indifferent to the soundness of his decision, partial in his treatment of the Bar or litigant and subservient to sinister interests.

It is a matter of frequent comment and almost unbounded

wonder to those under another system that in these United States, judges who achieve the Bench through a method wholly repugnant to the sentiment of the British peoples are so almost universally found to be of high legal attainment, sound judgment and independent mind. It is a matter of pride to all English speaking lawyers that the method of election or appointment has been found to be wholly immaterial; the honest lawyer, who the satirists says is the noblest work of God and about the scarcest, is not scarce on the Bench of the Union or any of its component States.

It is a matter of congratulation that it is almost unknown that even the bitterest critic charges want of learning, ability or honesty in the occupants of the Bench. It is, however, alleged that dissatisfaction has been felt with an apparent indifference to the demands of an advancing society, an unsympathetic attitude towards the masses. So far as that means that the courts should change the law laid down for them by decision or statute, the criticism is unjust and cannot be accepted. If it means that rules are allowed to crystallize into technical language so rigid that the letter can defeat the underlying spirit and purpose, "the case is different." The application of rules "must correspond with the practical necessities of the times." At least that is so in my democratic country; and I gladly adopt the language of the great lawyer whom many of you heard last summer in Montreal, the Lord Chancellor, Viscount Haldane, delivering judgment in the House of Lords, (1914) A. C. at pp. 37-38.

How far those in a land in which a system different from ours prevails can go in making the rules "correspond with the practical necessities of the times," I cannot say; but is not some of the real foundation (as distinguished from the political pretext) of this agitation, based upon the conviction that the practical necessities of the times have not been considered?

Be that as it may, it is perfectly certain that in every free country the people will and must have their way in the long run—with courts as with all else. It is the part of the patriot and the statesman to see to it that that way is the right way, and that the right way is found with the least possible delay. The

right way in litigation implies justice cheap, speedy, full and certain; and anything in the constitution and practice of the courts which is not conducive to that end is wrong and must be amended; if by the courts themselves, so much the better, and the sooner the better, but in any case it must be amended.

We live in an age of unrest; the principles underlying institutions are being investigated as never before; nothing is taken for granted; the motto is "you have got to show me;" the ever iterated and re-iterated question is "Why?" "Why?" "Why?" The courts should not and cannot hope to be an exception. "If our virtues did not go forth of us, 'twere all alike as if we had them not." The administration of justice is on its trial. What will be the verdict?

So long as there is a moral law governing the universe, so long as its affairs are governed by the Divine Law, the verdict must be certain. With a Bar alive with a keen sense of public duty, with a Bench whose members can say with truth and pride, "I have judged the people with righteousness and the poor with judgment—judgment have I laid to the line and righteousness to the plummet—I have executed the judgment of truth and peace in the gates—touching the righteousness which is in the law I am blameless—I have done no unrighteousness in judgment—I did not respect the person of the poor nor honor the person of the mighty, but in righteousness did I judge my neighbor—for I did not respect persons in judgment but heard the small as well as the great and was not afraid of the face of man—I did not wrest judgment nor take a gift, nor did I ask for a reward—I did not take bribes and pervert judgment—but I judged righteous judgment, the judgment which cometh from the Lord"—the verdict must be "Well done, good and faithful servants."

ANNUAL BANQUET.

ILLINOIS STATE BAR ASSOCIATION.

Thursday, May Twenty-eighth

Nineteen Hundred Fourteen

HOTEL LaSALLE

Chicago, Illinois.

MENU

Crab Meat Cocktail, Lorenzo

Cream of Fresh Asparagus

Celery Olives Salted Almonds

Filet of Bass, Meuniere

New Potatoes Parisienne

Roast Young Capon, Stuffed

New Green Peas Au Beurre

Frozen Tomatoes, Chatelaine Dressing

Brise de Printemps

Petit Fours

LaSalle Cheese

Toasted Crackers

Coffee

AFTER DINNER

Toastmaster

President Robert McMurdy

The Law of Service:

Mrs. Harlan Ward Cooley

Current Misconceptions in

Criticisms of the Bar:

Mr. Henry Moore Bates

Canada:

Mr. Justice William Renwick Riddell

Soloists

Mr. Julian Worthington

Miss Ada Casebeere

ANNUAL BANQUET.

MAY 28, 1914.

THE PRESIDENT: Ladies and Gentlemen: One in my position might well wish for that wonderful felicity of utterance which belongs to the Southerner. You remember Lincoln's description of the southern orator, who, he says, "steps to the front of the rostrum, stands erect, shines his eyes, opens his mouth, and leaves the consequences to God." (Laughter.) But really I have no occasion for such a gift because what I propose saying to you is of a very practical character. Because I can do so unselfishly at this hour I am going to urge you to extend the power and the influence of this Association. It is the second bar association, in point of numbers, in the United States; it can readily be made the first in the number of members. That is not important of itself, but is important nevertheless. We have spent two days here together and have settled most of the problems that confront the bar and the bench of this state, and settled them right. But unfortunately we have only settled them in an academic manner. If we are correct in our belief, and if we can persuade these very obstinate gentlemen at Springfield to pass the laws which we have practically agreed upon, this Association will have made a real step in real progress. But that can not be done unless the membership in this Association is largely increased so that with the increased revenue the officers of the Association may promote this legislation which we have agreed upon, at Springfield, in the only manner in which effective results are produced, the only manner adopted by our competitors who really want something at Springfield, namely, by having a man upon the ground during the session of the General Assembly, and with this increase of members this can be done. It is comparatively easy to produce this result if only the members here will consent to give a very small part of their time to it during the next year.

To me an association of this kind has a charm which I almost hesitate to measure. Chauncey Depew, in the zenith of his popularity said that sacrificing friends were not made after forty

except in politics. Those of us who have been in politics realize that it is true that sacrificing friends are there made, but sacrificing friends are also made in organizations of this kind, after forty. They are made in any movement where a body of persons is going forward under pressure in a common purpose. So that this Association affords an opportunity, the rare opportunity, of making this class of friends after we have reached the age of forty. Beyond that, an association of this character keeps us in touch with the best thought of the profession, not only here but elsewhere; not only in this country—I speak as of the present hour—but in other countries. And, after all, a lawyer who has a privilege granted to him by the state should be only too ready to recognize the obligation that goes with it to support his profession by promoting the interests of the associations that grow out of the profession.

Now this is a very practical talk. It is all I have to say: it is the least that I could say in justice to the coming management and in justice to the future of this really noble organization. It is only left for me at this moment to express your gratification and pleasure that our board tonight is graced by so noble a representative of our womanhood, by our truant prodigal son from Ann Arbor, and by this remarkable man who has addressed us today from the country across the great river. (Applause.)

MR. JULIAN WORTHINGTON: The orchestra will now play "The Maple Leaf Forever," the Canadian national anthem, after which you will rise and sing the first and second verses.

THE PRESIDENT: It is the province of the Toastmaster to disregard the order of the toasts; in fact, the Toastmaster's position is very much like the judicial position, and so it is that first this evening we will hear about Canada. (Applause.) Canada, that boasts a greater area than the United States proper and almost as large as the United States proper and improper. (Laughter.) Elihu Root, noticing the many honors and titles of our friend, suggested that the degree L.H.D. should, in fact, read I.H.D., "Doctor of International Harmony." Our friend was kind enough to say that he would not undertake to advise America

what she should do concerning her own affairs, but with the temerity of ignorance, I am going to undertake to advise Canada what she might do in some crisis in the future, when she has something to ask of America. If she will just send this refreshing guest over here and let him ask for it, it is hers. (Laughter and applause.) I will not stand longer between you and your desire, but merely introduce this man who walks with kings nor loses the common touch, Justice William Renwick Riddell. (Applause.)

MR. JUSTICE RIDDELL: Mr. Toastmaster, Ladies and Gentlemen: My friends in Toronto sometimes say to me, "Why do you decline to address Canadian clubs and decline to go to bar associations in the provinces of Canada, but still you will persist in going across and addressing universities and bar associations in the United States?" And they expostulate with me; and I promise to repent, and promise better conduct in the future; but all the time there is in my heart the prayer of St. Augustine: "O Lord, convert me, but not just yet." (Laughter.) Or possibly I might use a more familiar illustration—the humble follower of the great Augustine, Rastus, so well known in the south, was very much touched by the Friday evening discourse of his pastor, who was urging upon the flock the sin of chicken stealing, and begging them to repent and be saved. He saw that Rastus was touched; and when Rastus intercepted the parson on his way home he knew that something important was to be said. He said:

"Pahson, would it make any real difference if I wasn't converted tonight, but put it off till tomorrow night?"

"Well," he said, "Rastus, now what is the sense of all this? If you are going to be converted, you might as well be converted tonight and get done with it. What is the use of running chances like that?"

"Well," he said, "Pahson, to tell the truth, I want to have one more feed on a chicken and I think I know jest where I can get that chicken tonight." (Laughter.)

The parson said, "Well, Rastus, that is a very serious question. I think I shall not answer it just now, but I will come

around tomorrow and have dinner with you and I will discuss the matter with you then." (Laughter.)

I do not want to be converted just now, and I always do want another chicken feed when I get an invitation to an American university or an American bar association.

And I do not want to be called (as I was called today) a foreigner, either. (Laughter and applause.) I am not, and I won't be one.

Any time after the closing of my court in Osgoode Hall I can take the train and by morning be in another Canadian city. A lawyer, when he has a holiday, of course always goes to court, as an actor always goes to the theatre. And although I am a judge I still insist upon being a lawyer; I am not like that other Canadian judge who when he was appointed to the bench at once proceeded to sell his library and buy a new gun. (Laughter.) You think that is a joke; it isn't. (Laughter.) Being a lawyer, I naturally go to court. I see the court house built very much like our court houses in Toronto, covered by the same old flag which covered me in infancy and of which I am perhaps inordinately proud; and I feel at home. I enter the court room and I see the judge, garbed as I am in Osgoode Hall, with a silk gown, white lawn bands, Queen Anne coat and waistcoat, sitting on the bench. I see King's Counsel with their silk gowns, and everything looks familiar. But wait a minute; they begin to talk, and they talk a language which is not the language which I learned at my mother's knee, but a perfectly good language for Quebec, that is French. And when the judge begins to lay down the law, I know that is not the law that I have been accustomed to. It has an ancient and a fish-like smell, reminding me of the law that I read when I was a student in Victoria College where I won my degree of Bachelor of Laws, the Roman law, the civil law, and I say, being of Scottish descent, "This is no my ain hoose." But suppose I go the other way? I get off at Buffalo, one-third the distance—I dare say you have heard of that place; it is a suburb of Toronto. (Laughter.) Or I go a little further, to New York; I possibly come west as far as Detroit, and

again I seek a court house, and I find one, because there is no American city or town or village or hamlet so small that it has not a court house, and over the court house floats a flag which is not my own flag indeed, but it is a flag of the same red, white and blue as my dear old flag, the Union Jack. (Applause.) And I enter that court house and I see the judge upon the bench; it is not the Queen Anne coat he wears, it looks rather like a late Victoria than a Queen Anne. He has no gown, the lawyers do not address him as "My Lord"—I suppose he would fall down dead if they did. He does not have on the bands as we have. It is well if his boots are not yellow or brown, and his waist-coat purple. But the language that they talk is familiar, that is the language that I have heard since I was a baby—with a little different accent, indeed, but I can make out what they say. (Laughter.) When the judge begins to lay down the law I recognize the law as the law that I have been accustomed to lay down in Osgoode Hall, and that has been laid down for me ever since I was called to the bar. And in a land in which the English language is the language of communication between bench and bar, and the English common law is the basis of judicial decisions, no British Canadian can be a stranger or an alien—and I am at home. (Applause.)

The language, as I have said, is practically the same; we know that we talk English, and my American friends believe that they also speak English (laughter), and it is English, no doubt. (Laughter.) It is English that I can follow distinctly, more easily than I can follow French or German. There are little differences, perhaps, in pronunciation, in intonation, but not much more than the difference between Toronto and Montreal, or between Ottawa and Victoria. It always reminds me of the Boston lady who found fault with the lady from Wiscasset, Maine who came down and was visiting her in Boston and who persisted in talking about the "mooral" paintings. She said, "Don't you remember that 'mu' in 'mural' is pronounced 'mew' as in cat; the dictionary tells you so." (Laughter and applause.)

I have been reading, in a sort of way, French and German, for longer years than I like to say when I am talking to ladies, but I will say twenty years—it might easily be doubled if they were not present. I can not speak French or German very well—I can follow them in a certain sort of way. My friends tell me that no man and very few women can understand the genius of the German language, much less the genius of the German people unless they speak German fluently and understand German when it is talked fluently. And I do not know what your experience may be, but I never heard a German talk yet that he wasn't talking fluently. (Laughter.) Just you try to follow them sometimes and see how fluently they do talk. So in the same way with one who is not born to the English language, whose birth-right is not the English language, who comes to the English language late, if ever—he can never understand the genius of the English language, much less the genius of the English speaking people. It requires a person who talks English to understand the genius of the English speaking people; and that is why we English speaking people are all one, no matter where we live or under what flag we may be found. (Applause.) We understand each other, we are the same people and it does not make a straw's difference what our descent may be.

And we are rather contemptuous of those who do not talk English. I suppose you all remember the story of the old Scottish women who were sitting talking one day about the battle of Waterloo. One said:

“Jeanie, woman, it's nae wonner that oor folk won at the battle.”

“Why do you say that?”

“Oor folk prayed.”

“But do you no think the French folk prayed too?”

“Prayed! the French! Wha could understand them, the jabberin bodies?”

(Laughter.)

The English lady who spoke French perfectly well refused absolutely to speak French in Paris because as she said it would just encourage them.

So we have the idea that we must force our language upon the whole world; and indeed it will be God's blessing when our language is spoken throughout the whole world, because it will be the making of the world to be at one with the English speaking peoples. (Applause.)

Now you have been good enough, your Chairman has been good enough to speak kindly of my beloved country. In what I have to say to you in the few minutes—or many minutes according as I am received (laughter)—that I am going to speak to you, I may repeat something that I said last night, but if anybody heard me last night and happens to be here this evening, I am sure he will forgive me, because I have only one song to sing to the Canadian and the American people.

Canada, less than a generation ago was but little more than a geographical expression. Within the years which can be counted in the years of a man's life, she has shaken off the shackles which bound her beautiful limbs, she has thrown off the lethargy under which for long she had sunk supine, and she has risen with her proud face set and her eye, like the eagle's, upon the sun, rising onward and upward to take her place amongst the nations, no unworthy sister to stand beside this greater and older and wealthier and stronger nation to the south of her, her own brother.

The proud Canadian speaks of his beautiful land to the east, the land of Evangeline, down by the sounding sea, the land of blooming orchards, mines of coal and gold, hardy fisherman, Prince Edward's Island, blest with climate and soil denied to other parts of the world; New Brunswick, with its harbors, shipping, fishing, farms and its forests, brings us to old Quebec. Quebec, the home of the habitant, if you will, but the home of the poet and the statesman, with her two twin cities, Montreal nestling under the foot of her historic mountain looking out upon the broad expanse of the St. Lawrence, the market for half the continent, not to be despised by this great city or by the proud city of New

York. Quebec, beautiful old Quebec, which some of her admirers call a piece of the middle ages set down in our modern age, sitting upon her mountain, the Plains of Abraham, where was fought out for the last time the battle of ascendancy upon this continent between Wolfe and Montcalm, looking out over her beautiful St. Lawrence across which is Levis, another important and historic spot. She is not so lost in contemplation of her own beauty and charm as to be deaf to the call of insistent commerce. The farms of Quebec are recovering their wonted fertility. And if it be said that some of her people are not alive to the modern age, are not alive to the possibilities of material advancement, it was not those who were troubled with many things, sir, who received the Master's commendation. It was Mary who only sat and listened to her Christ.

Then we pass up to the Queen Province of the Dominion. It was no vain boast when the Speaker of her first Parliament spoke of Ontario as the first Province of the first Dominion of the greatest empire that the world has ever seen, Ontario, but the other day populated by a few United Empire Loyalists, now with her three million inhabitants, her harvest, her orchards, her flocks and herds upon a hundred hills; to the south, the peninsula where grows the peach and the grape and the cherry and the plum; north to where, when the world was in the making, were hidden deep in the bowels of the earth, mines of gold and copper and silver and iron for the use of the twentieth century Canadian. Passing west to Manitoba, small in extent but mighty in fame, known wherever the English language is spoken, producing wheat which is the standard for the universe; then to the latest progeny of our mighty Dominion, the two twin Provinces of the Plain with their rolling prairies, their beautiful streams, their soil so rich that, tickle it with a hoe and it laughs into a harvest, with their ear to the ground listening for the tramp of the coming millions, their arms open wide to all the world for those who desire a competence, the reward of honest labor, but having no place on all their broad soil for the criminal or the

tramp or the laggard; British Columbia, with her giant trees, her splendid harbors, her mines of gold and of coal, her bays and inlets where the navies of the whole world may ride secure. Then to the Yukon; it is no longer the call of the wild alone which lures the adventurous; the merchant, the banker, the millionaire, finds his account in the streams of the Yukon. Verily our lines have fallen to us in pleasant places and we have a goodly heritage.

But it will be said, and with truth:

"What constitutes a State?

Not high raised battlement or labored mound,

Thick wall or moated gate;

Not cities proud with spires and turrets crowned;

Not bays and broad-armed ports,

Where, laughing at the storm, rich navies ride;

* * * * *

No:—men, high-minded men,

* * * * *

Men who their duties know,

But know their rights, and, knowing, dare maintain;

* * * * *

These constitute a State."

(Applause.)

And how do the Canadians meet that test, the test of the old Greek poet, the test of all the ages? Shall I speak of the olden times, the olden times of French ascendancy, the time of the stately governor and his stately court with all its old world courtesy? or shall I speak of the devoted priests and missionaries armed only with the cross entering those pathless wilds carrying the bread of life to the savage, knowing in their heart that what was coming was death and most excruciating torture? Or shall I go farther east, down to the land of Evangeline, the land of Acadian farmers, "Acadie home of the happy"?

"Acadie, home of the happy," where dwell

"Men whose lives glides on like rivers that water the woodland
Darkened by shadows of earth but reflecting the image of Heaven"
There in

"The forest primeval. The murmuring pines and the hemlocks
Bearded with moss, and in garments green, indistinct in the twilight,
Stand like Druids of Eld, with voices sad and prophetic,

Stand like harpers hoar, with beards that rest on their bosoms.
Loud from its rocky caverns, the deep-voiced neighboring ocean
Speaks, and in accents disconsolate answers the wail of the forest."

Or should I tell you about the United Empire Loyalists, men who gave up everything, land, home, property, all save life itself, in order that they might keep the faith which they had sworn to England's crown? Men who loved the cause which had been lost and kept their faith to England's crown passed into exile leaving all behind except their honor. Not like poor fugitives they came into exile in our Canadian woods, but full of heart and hope, with head erect and fearless eye, victorious in defeat. Men as true lovers of their country as John Hancock or George Washington, but with a little different viewpoint, gave up their everything in order that they might remain British, they were all loyalty, and that loyalty has not worn out or bred out in their descendants. That loyalty is equalled by theirs who came later, the Scot, the Englishman, the Irishman.

But while we were faithful to the British crown, to the King and Queen of Britain, we insisted upon governing ourselves. You could not persuade an Englishman or an Irishman, much less a Scotsman who came out to Canada, that he had left his brains behind him in the old land; and the descendants of those who had come out could not be got to acknowledge that the descendants of those who had been left behind had any more brains or were better able to govern the country than the descendants of those who had come out. We insisted on governing our own in our own way. One Bunker Hill was enough. (Applause.) The embattled farmers who stood in their uneven, weak looking line, who owed nothing to the drill sergeant but much to the strong heart—the embattled farmers with their old fashioned muskets and rifles, who took their stand on Breed's Hill and Bunker Hill and withstood the King's red-coats, so took their stand not only for the thirteen colonies, not only for the inhabitants of America as it then was and for their descendants, but for Canada and Australia and New Zealand and South Africa, for England itself and all that makes the British Empire

worth while. (Applause.) It is part of the very genius of our people, it is inbred with us, it is part of our very life with which we will part only with the last drop of our blood, that we shall govern ourselves, whether we govern well or ill; we want no benevolent autocracy. (Applause.) We are a democracy and we propose to govern ourselves. And the old mother had learned her lesson, and never thereafter did a colony demand responsible government but it was given to her.

And during all these years what about the brother to the south? We had infinite trouble with the Americans, you know. They invaded us in 1812. They thought they licked us. We didn't. A difference of opinion that still subsists, I understand, in the school histories. (Laughter.) At all events, both were satisfied and both had had enough. We had trouble with the American people, the American government I ought to say, in connection with our trade policy. For years there was whip-sawing back and forth. The Canadians desired a certain treaty with the United States and the United States said, "Nay, nay," and later when the United States had come to believe that was the right thing, Canada said, "Not any for us, thank you." In 1854 it was believed that an end had come to all these troubles when the reciprocity treaty was framed by Marcy and Lord Elgin. Well, that went on till 1866—Great Britain had not, as you thought, been behaving herself too well during the trouble that you had with your friends of the south which the speaker has been mentioning, and the United States thought that she would just give Britain a lesson. She accordingly gave Britain that lesson by an attempt to force Canada into the Union by abrogating the Reciprocity Treaty. Well, that was one way of doing things. That was the Pat Casey way. Pat Casey was a compatriot of my friend, the Chairman. He was crossing a fine pasture one day and a bull came after him; and Pat ran, indeed if it had not been for the exercise he had had in his early days in the wilds of Connemara, I am not quite so sure that the bull would not have gotten him. But Pat got over the fence at least three yards in advance of the first horn of the bull. Pat next day armed himself with a great blue-beech club, and he

came to that field again; in it there was a weak little bit of a calf, which came with its waggling tail and trembling legs and nozzled around Pat, whereupon Pat gave it a most unmerciful bat with the club and said, "Now go and tell your father that Pat Casey did that." (Laughter.) Now you see the application. The old country had given the United States a bit of a race, there was no doubt about that, and when poor Canada came and snuggled up to the United States with its trembling legs and shaking tail, the United States played the Pat Casey act and gave Canada the club and said, "You just tell father John Bull that Uncle Sam did that."

Canada was hard hit. I know whereof I speak. I was a lad on my father's farm at that time and I know what I am talking about. Canada was hard hit. She had been accustomed to export everything she had to the United States, and import the greater part of her manufactures from the United States, by lines of trade running north and south. That stopped the exportation of our barley, of practically all our raw material. Canada had to find new fields, she had to make her trade go in another direction, east and west. We had to change the whole system of agriculture. We did it. We are a proud people and we ask nobody's help and nobody's pity. The United States had a perfect right to do what it pleased, and we had to submit; but we held our heads up, and we kept them up. And anybody who has watched what Canada did since 1866, changing her course of trade to east and west instead of north and south, building up her manufactures so we need not depend on the United States, making our exports cross the Atlantic instead of the lake, will at least acknowledge her spirit. Year after year our people went down to Washington asking for a renewal of the Reciprocity Treaty. Sometimes they were received with courtesy, sometimes with not very much. But courtesy or no courtesy, when the banquet was spread and the cover was taken off, the dish was always crow. (Laughter.) And when after Sir Wilfred Laurier, than whom there is no greater and warmer friend of the United States in the British Empire today (applause) became Prime Min-

ister of the Dominion he went to Washington and used his influence; and nobody who knows the dignified courtesy of Sir Wilfred Laurier but will appreciate the kind of treatment that he received when they know that when he came back he said, "I will never go to Washington again."

Well, time went by, our trade was established, we were making our mark amongst the nations: our merchant marine was third in the whole world; our manufactures were becoming known, our exports; our manufactures in some lines were the greatest of any nation in the world; we were advancing in population, and when your Mr. Taft offered a Reciprocity Treaty, much more favorable to Canada than any which she had sought, Canada said: "It is too late; too late. We have established our policy, we shall not be dependent upon the American nation, thank you. We have our own policy and we will attend to that." Canada had a right to do it. Forty-eight and one-half per cent of the voters in Canada voted in favor of the Reciprocity Treaty; fifty-one and a half per cent of the voters in Canada voted against the Reciprocity Treaty. We are a democratic people. We have no king or president to rule over us and to tell us what to do; we do as we please. (Laughter and applause.) In the finality, in the true democratic spirit, we submitted to the will of the majority and reciprocity became a dead question.

You know the story, I suppose, about the gentleman who was inordinately fond of dancing? A little fonder of dancing than were the ladies of dancing with him. His feet were a bit extensive and intruding, and there was some difficulty in keeping quite out of the gentleman's way. Dancing one evening with a young lady he said: "Oh, you dance so divinely I could dance straight to heaven with you." She said: "Can you reverse?" (Laughter.)

When Mr. Taft said to Canada, "I would like to waltz to heaven with you in this glorious trade movement," Canada said, "Can you reverse, Mr. Taft?" (Laughter.)

But there was no more ill will or enmity against the American people in that act than there was in the American people refusing

year after year and year after year and year after year and many times to allow the Canadians to have their heart's desire. Every country does that which it believes to be best for itself and for its own people, and when the United States, without the slightest rancor against Canada—because they never hated the calf, it was the bull they were after—kept up their walls of protection against Canada, so Canada, without the slightest rancor against the United States kept up her walls against the United States, and she intends to do so unless the people change their minds—if they do, they have a perfect right to.

Now during all this time and for a hundred years or more, there have been many disputes between you on this side of the international boundary and us with our mother country on the other side of the international boundary. There have never been disputes so acute, there have never been misunderstandings so great—and there have been misunderstandings; there have never been quarrels so grave—and there have been quarrels—that it was thought necessary that a brother should dye his hand in the blood of his brother across the international boundary. And the peoples have been growing more and more together. That essential and fundamental unity which exists between us has been working all the time. We know each other better, and knowing each other better we like each other better and we are becoming more and more harmonious as years go by. Now do not let me be misunderstood. There are people in Canada who have not that feeling towards the United States, just exactly as there are people in the United States who yet believe that England is the enemy, that she hates freedom and that she is envious of the freedom of the United States. There are those up in the mountains of Tennessee, they tell me, who still vote for General Jackson. And there are also those who believe that England is the enemy. So with us we have some who can not get rid of the old time rancor and resentment for the disasters of the United Empire Loyalists who were cruelly treated by those who ought to have treated them best. Just shortly before I left Toronto a well known gentleman said openly, "I have no interest in that trouble between the United

States and Mexico. That just reminds me of the hunter having a fight with a bear, and his wife looked on and she said she hadn't any interest in that fight, she didn't care whether the bear or the man whipped." Well, it is highly probable that when the bear began to get the better of the old man the woman's heart would fail, she would remember the lover of her youth, the companion of her middle age, the years of at least comparative happiness—and that is all, you know, any of us have (laughter)—the years of comparative happiness that they lived together, and I am strongly inclined to think when the bear began to get the upper hand the old woman would not be far behind with the gun or the ax. (Applause.) I do not believe my friend, the fire-eating colonel would hesitate for a moment to head his cavalry if it were really necessary to help the American people if they were in any real straits. (Applause.)

But do not imagine for one single moment that we have a monopoly of such, for we have not. You have them in this part of the continent also—seldom, I admit, but still you do meet them occasionally. I saw the other day in the paper that one of your Representatives in the House in Washington, speaking of the discussion that is now going on about the Canal—and as I said this afternoon, I am not going to say anything about it, the American people, as I have said more than once, are the guardians of their own honor, they know what the right thing is to do and they are going to do the right thing, some time. I have no fear about that. (Applause.) They do not need any advice from anybody either on this side of the Atlantic or the other. They know their own business, they are honorable people and they know what honor demands. But the Congressman was speaking of that, and spoke of the time a hundred years ago when the peerless American eagle tore the tawny hide of the British lion and with it lined its nest up on the mountain side. Now the gentleman was wrong both in his facts and in his terminology. The peerless American eagle—now outside of beer—no, I shall not say that because if I say outside of beer there will be some misapprehension as to what the banquet people supplied me, and I assure you I am not "out-side of beer." *Aside* from beer and outside of corsets—I

am right there—aside from beer and outside of corsets, that gentleman ought to know there is only one who can properly be called peerless, that is the gentleman who took “Sec,” out of “Secretary” and replaced it with the luscious and unostentatious and invigorating but non-intoxicating grape juice. (Laughter and applause.)

It is he of whom your poet sings
 “Whangety, Whangety, boom!!
 The circus is down by the creek;
 The canvas has plenty of room,
 But look at our side-show unique—
 For marvelous Mabel
 Will juggle a table,
 And William J. Bryan will speak.”

Then his facts. It is perfectly well known in natural history that an eagle does not make his nest out of hides at all; and aside from the fact that the British lion does not notice any diminution of the tawn upon his hide, or hide upon his tawn, we know the nest of the American eagle has been feathered with sticks from France, perhaps considerable from Spain, particularly in the southeast part of your dominion, and a good sized chunk of Mexico, but so far as Britain is concerned I venture to think she has all the sticks she ever did have, at all events all the sticks she had before 1812.

But what about the great heart of the people? Froth I have seen on the Atlantic covering for miles the broad bosom of the mighty deep, the little spray blown here and there by the wind, and foam covering that great mass of quiet solid deep blue water. Are men like my friend the colonel and your friend the representative truly representative of the great heart of the American people or of the Canadian or of the British people? We are one at heart and always have been and must continue to grow more so.

The hen remarked to the muley cow

As she cackled her daily lay—

That is, the hen did—“It is funny how

I am good for my egg a day:

I’m a fool to do it, for what do I get?

My board and lodging—why

The poodle gets that, he's the household pet
 And he never laid a single egg yet
 Not even when eggs were high."

The muley cow remarked to the hen
 As she masticated her cud—
 That is the cow did—"Well what then?
 You quit and your name is mud
 I give six gallons of milk each day
 And I get my stable and grub
 The parrot gets that—or anyway
 All he can gobble and what does he pay?
 Not a dribble of milk—the dub!"

The hired man remarked to the pair,
 "You get all that is coming to you
 For the poodle does tricks and the parrot can swear
 Which is more than you can do.
 You're necessary, but what is the use
 Of bewailling your daily lot?
 You are bourgeois, work's your only excuse
 What them fellows does is art."

(Laughter.)

Now, my friend the colonel and the representative are artists. What about the folk who are bourgeois? You are necessary, all you can do is just to produce, whether you be the horay handed son of toil producing turnips and potatoes and grain, or smooth handed sons of toil producing law suits and executions, what about you, you produce. Where is your holler? I have no fear, I think I know the American people as well as anybody (not an American) can. I have associated with American people probably more than most Canadians, and I think I know the American people, and I know I know my own people, and I know their heart is as true to the other branch of the English speaking people as the needle to the pole, and I have confidence that your love for Canadians is as great as the love of Canadians for you.

There is in the south of France a beautiful statue on which are inscribed the words in Latin, *Sollicita sed non turbata*, "Anxious but not troubled." That is the way in which England looks

upon the United States; that is the way I want to think the United States looks upon England. That is the way in which Canadians look upon the American people, and I hope that is the way in which the American people look upon the Canadians. We are anxious as to what you shall do; we are desirous of knowing what you shall do; it is not a matter of indifference to us what you may do because you are our very brethren. But we are not troubled, we know you are going to do the right thing. Ultimately the right will come to the top with all right feeling people. We are solicitous; we are anxious but not troubled.

Now, what of the future? For a hundred years you and we have been living together on opposite sides of an international boundary, the longest the world ever saw, and without a fortification and without a soldier. Our international waters have not been polluted by the keel of a ship of war. An American is at home in Canada once he gets past the custom house, and the Canadian is at home in the United States, although a Canadian lady sometimes leaves her feathers at the border. We are the same people; we have lived in peace together. Is that to be perpetual? If so, if two great nations like these, so strong that they need fear no foe, with that chastity of honor which feels a stain like a wound, can live together for a hundred years and at last join hands and say: as for us and our house we will serve the God of peace, the reign of peace, my friends, is not coming, but it has already arrived. That peace for which the world has been yearning for hundreds of years is with us. We must have peace. My God! my friends, throughout this world what is going on day by day? The cry of the oppressed and the slave is rising before the throne of God every day. The tear of the poor is bedewing His footstool every hour. Who will still the one and dry the other if it be not these two nations? It is not easy. It is not easy. War is romantic. War is ancestral. War is part of the instinct which we have inherited from our savage ancestors, possibly from savage ancestors before these were men. Peace has no prancing steed. Peace has no waving banners. Peace has no burnished helmets and glancing swords. Peace has no brilliant

uniforms and flashing eye. Peace is as drab and gray as her own dove.

“War.

I abhor!

And yet how sweet

The sound along the marching street

Of drum and fife, and I forget

Wet eyes of widows, and forget

Broken old mothers, and the whole

Dark butchery without a soul.

Without a soul—save this bright drink

Of heady music, sweet as hell;

And even my peace-abiding feet

Go marching with the marching street,

For yonder, yonder goes the fife,

And what care I for human life!

The tears fill my astonished eyes,

And my full heart is like to break,

And yet 'tis all embannered lies,

A dream those little drummers make.

Oh, it is wickedness to clothe

Yon hideous, grinning thing that stalks

Hidden in music, like a queen

That in a garden of glory walks,

Till good men love the things they loathe;

Art, thou hast many infamies,

But not an infamy like this.”

Peace nevertheless is coming: peace which has been foreseen for all these generations is on its way. And when they tell me, as was told me by a professor of theology not very many months ago—a Presbyterian he was, by the way, so I knew what he believed—he said, “What are you doing, you peace people, you are not a bit further on than you were.” I said, “My friend, you believe that Christ died upon the accursed tree nearly nineteen hundred years ago in order that poor humanity might be saved, and two hundred years after His death there were not ten thousand Christians and now nineteen centuries after His death only the fringe of heathendom has been pierced.” But Peace is

making its way, it must make its way, and unless the moral law by which the universe is governed fails, unless the promise of God made to His people is to be of no effect, then is not more certain the path of the planet around the sun than that two peoples like these, speaking the same language, worshipping the same God under the same forms, having the same institutions, the same proud history in common, must stand side by side and march side by side in the cause of justice and righteousness and truth. I ask for no treaty, no parchment bond, for there is that which is stronger than any band or links of steel, it is the moral law which governs the universe. Our union may be informal, but it is an abiding fact; and it is of that union that I am accustomed to apply the words of your own great poet:

“Sail on, O Union, strong and great!
Sail on, nor fear to breast the sea,
Our hearts, our hopes are all with thee!

Our hearts, our hopes, our prayers, our tears,
Our faith triumphant o'er our fears,
Are all with thee,—are all with thee!”

My brethren of the American Union, God grant it. (Applause.)

“Illinois” was then sung.

THE PRESIDENT: We have been told in the past that the springs of conduct are the fear of punishment and the hope of reward. But in these latter days a new philosophy has sprung up which has taken hold of the people, the doing good for the sake of doing good—the doing good for the good we may do to others, which we used to speak of as altruism but nowadays as the Law of Service, and we shall learn of this new faith from one of its most consistent apostles, the flower of Chicago womanhood, Mrs. Harlan Ward Cooley. (Applause.)

MRS. COOLEY: Mr. Toastmaster, Gentlemen and Ladies: The topic assigned to me by the Chairman of the Program Committee, “The Law of Service,” is one that must bring any speaker at once into sympathetic harmony with any Chicago audience. I do not find in its compact legal phraseology a challenge to those who would trace the development of civilization in dusty archives.

There are two methods of approaching any subject, one by the plummet line and scales, the other with the divining rod. One who would recreate and send forth that evanescent spirit which we variously call charity, love, service, needs not the laboratory of the scientist, but the sympathetic eye of one walking down the highways of the centuries in the attitude of Browning's poet. In such an effort to connect service with the living forces of society, I am reminded of an incident in the life of the poet Tennyson. Shortly after the publication of the "Vision of Sin" Tennyson was startled to receive a letter from a renowned arithmetician and statistician which ran as follows:

"DEAR SIR:—I find in a recently published poem from your pen the following unwarrantable statement: 'Every moment dies a man, every moment one is born.' I hardly need point out to you that this calculation, if true, would tend to keep the sum total of the world's population in a perpetual state of equipoise, whereas it is a well known fact that the said sum total is constantly on the increase. I would therefore suggest that in the next edition of your estimable poem you correct this erroneous statement to read as follows: 'Every moment dies a man, every moment one and a sixteenth is born.' The actual figures are one and one hundred and sixty-seven thousandths, but something must, of course, be accorded to the laws of nature."

We can only say with Othello "but yet the pity of it" to be willing to affix one's signature to a communication of that kind. "The universe must be seen through a prism and not through a microscope," said George Sand, that gifted woman to whom love of humanity amounted to a religion.

There is, I believe, a maxim in law which says: "*Cessat ratio, cessat lex.*" But "dreams, also," said Plato, "are from God." I feel that nature's injunction was not only: Let there be things reasonable, but let there be things poetical and fanciful as well. There are subtle processes which take place in the mind of any searcher after truth which involve not only reason and intellect, but heart and conscience as well. With this latter equipment then, and in a purely dilettante spirit, I invite you to join me in an

effort to trace the development of service.

We may trace the law of service, that plant of modern rich floescence, back through the ages until we find its roots deep seated in the heart of the race. Man has waited long in the outer chamber of his higher life. Among the impressive things of which we read none are more mentally stimulating than the beginnings of the world's altruism. We can not go anywhere in history or mythology without coming upon the vital embodiment of this spirit. What noble forms of manhood and womanhood flash upon our vision in these old pages and stay in our regard. They were our spiritual kinsmen, these ancient workers in this precious metal which we call altruism, and we, in the splendid work which we are doing today are only carrying on the golden thread of emotion bequeathed to us by them. As far back as we can read the man of brain and vision has, through service, been the leader of his time. The earliest human records are embedded in fable. Man has always used fable in the interest of progress and truth. Prometheus was bountiful with uplifting gifts for men. Orpheus tamed the wild animals. Aeschylus puts these significant words in the mouth of Prometheus:

"List rather to the deeds I did for mortals,
How being fools before,
I made them wise and true in aim of soul.
How blindly and lawlessly they did all things,
Until I taught them how the stars do rise and set in mystery
And devised for them number, the inducer of philosophy."

Thus we see that from the beginning the deepest concern of the world had been not with things but with humanity. Consider the multitudes of inventions. The wheel, the lever, the bow, the sling, things which our children use as a matter of course with a sort of hereditary instinct, these and countless others waited for the genius to make them the servant of man. Lowell says, "He was a benefactor who counted the five fingers of one hand," and he was working under a fine impulse of the law of service who counted the other and gave us the decimal system.

There is a line in Dante which illustrates the scholar as the sharer, defines him as one who shall increase our loves, and give

value to life for us, beyond which there is no greater service. Take the fictions of the middle ages; what mean the Seven League Boots, the Lamp of Aladdin, the Quest for the Spring of Eternal Youth, the Faust Legend? They are the premonitions of what the wise men of this generation have given to us. What each age in darkness longs for, that the seer, in whom genius, like nobility, is an obligation, working under the law of service, will toil to bring to pass. Each age works in its own particular artistic medium, all bearing witness to the spirit of service. The ideals of Greece were expressed in architecture. The fine sense of justice of the Romans was embodied in their law. Then the painter became the spokesman of his time and in the canvasses of the Renaissance in undying pigment are related the aspirations of that period. Then came the drama, and in the living pages of Shakespeare and his contemporaries we find the repository of sixteenth century thought. Today in the novel and in the purpose play we find the adequate expression of the modern world. Ours is preëminently the age of social and economic reform. The tide has turned away from the reflective to the unremittingly effective. It is not enough that the modern reformer should, like Goothe's Werther take the suffering human race and

"Read each wound and weakness clear
And strike his finger on the place and say
Thou ailest here and here."

The modern benefactor must be not only a diagnostician, he must be a magician and healer as well, an atlas of the new world of aspiration, not only bearing but uplifting it. We feel that Kate Barrington, the heroine of Mrs. Peattie's latest novel, "The Precipice," has her heroism as well as a Prometheus, and that her service was no less valuable than his. In her experience, we see the ugly thing turned to a thing of beauty by the golden finger of self sacrifice. All over the world today corruption and injustice are being fought. And behind this movement are men and women like Kate Barrington, of vision and courage and high ideals who are giving themselves generously to society.

In whatever groups we come together today, in our City Club, the Woman's City Club, the Association of Commerce, doubtless in your law associations, most assuredly in our women's clubs, we are drawn by the magic of that word "service." Service is our watchword, humanity is our theme. This new philanthropic spirit we have found embodied in our literature; it is found in politics and echoes from all party platforms; it is the life and energizing force in our women's clubs. The issues with which in mainly concerns itself are the progress of society, the condition of labor, the safeguarding of the laborer, the welfare of children and the various civic abuses against which we were so recently waging warfare. The finest sign of the times is this substitution of organized effort for the somewhat haphazard altruism of a generation ago. In our search for some force that will bring mankind tranquility and inner happiness, our thought is turned to external conditions. You remember the immortal myths of Greece and Rome, youths and maidens transformed into trees and flowers by the compassion of the gods. The modern valiant spirit longs for no such metamorphosis. With us it is society itself that must be changed.

If now we take an inventory of twentieth century achievement it is not the practical gains that we think of, the great undertakings furthering material advancement, it is rather the altruistic spirit which animates the modern world, which seeks to bring about insofar as possible the evolution of social opportunity, and the impression is heightened by the fact that this attitude is due not to a sense of duty but to a thoroughly awakened social sympathy, the law of service dominant in present day affairs. This law must then be regarded as a continuous evolution, a perennial force lasting in the race, whether it be a Priest of Pan bringing with him into the humble cottage all the miracles of the advancing spring, or a Prometheus spreading broadcast all the gifts of heaven and earth, or some Edison or Marconi scattering with lavish hands material gifts, or perhaps a Jane Addams, who in the eye of the imagination we see surrounded by eager, upturned faces, are all helping to build that ideal city whose walls, like those of Camelot, will last forever because they are never built. (Applause.)

"America" was then sung.

THE PRESIDENT: A lawyer must be deaf indeed if he has not heard some of the recent criticisms of the bar. But now it appears that there are misconceptions among these criticisms, and this statement of the case makes me think that perhaps we have what Mr. Dooley might call a "champeen" of the bar among us. I am only delighted that he returns to us, and I wonder that Chicago ever permitted him to go away from us. Dean Henry M. Bates, of the Michigan Law School. (Applause.)

MR. BATES: Mr. Toastmaster, and Ladies and Gentlemen: The rather extravagant though brief word of commendation which your Toastmaster used in introducing me reminds me of the peroration of that country parson who said: "Brethren, the same God that created the golden orb, the sun, created the blushing rose; the same God that made the mountain created the tiny violet; the same God that made me made a daisy." (Laughter.) I feel that your Toastmaster, through me as a very unworthy medium has achieved omnipotence. It is so common for inexperienced speakers like myself to complain of want of notice and lack of preparation that no doubt it requires hardihood to repeat the offense, nevertheless my tale of woe is so genuine, the facts are so convincing that I shall undertake to inflict you. The truth is that when I accepted Mr. McMurdy's invitation to come down here I supposed that by the time I had delivered the paper which I read this morning I would be practically *efunctus officio*. I supposed if I were to be called on at night as he had intimated, I would be only one of many speakers, very obscure and expected to say only a few conventional phrases, but much to my dismay I found when I reached Chicago this morning that I was one of only three speakers and that the other two alone constitute a galaxy. I was quite unprepared to speak at the same board with the splendid and generous judge from Canada or with the brilliant and gracious president of that great club whose splendid work every citizen of the United States ought to know about, and in which I may claim a peculiar interest, as my own mother for many years has been and still is a member, and my wife was a member until we left Chicago some

years ago. I was quite unprepared to meet such a test, nevertheless, as Locksley is reported to have said a man can only do his best, even, I might add, if the circumstances make that best approximate his worst. (Laughter.)

I am afraid the Toastmaster is destined to disappointments other than those I have indicated, for I shall take the liberty of somewhat changing the subject printed in connection with my name. I rather dodge the responsibility of being the "champion" of the bar, I rather prefer to rest my remarks upon the title, "some current misconceptions of the criticisms of the bench and of the law which it has created."

Mr. Justice Riddell has further embarrassed me tonight. I had some notion of defending, in a feeble way, our common law and the courts which declared it, but this afternoon he fairly riddled the common law and declared with much emphasis that it really made very little difference whether most of the constitutional decisions which we have heard of from infancy had been decided at all, or if they had been decided in precisely the opposite way from that in which in fact they have been decided. Nevertheless I venture to believe there is something to be said to the contrary. Mr. Justice Riddell remarked that perhaps it would have been as well if the Dartmouth College case had been decided contrary to the doctrine which we lawyers have struggled with so long. I dare say he is quite right about that, for it seems to be rather the general consensus of opinion, that Daniel Webster over-did the matter. Now I was somewhat surprised a while ago when a colleague in the department of history in the University of Michigan informed me that he had recently seen a letter written by Daniel Webster before he undertook this case, a letter to the other side asking to be retained on that side of the question. The Justice might have taken the income tax decision of the Pollock case as an instance of his thesis and he might have claimed that that case might just as well have been decided the other way. Certainly had that case been decided the other way the country might have been spared some useless irritation and some expense and trouble.

Nevertheless despite these and perhaps a few other decisions, the effects of which have been limited or destroyed by legislation or by the Supreme Court itself; I believe that no careful student of American institutions and American constitutional law, can possibly escape the conviction that such cases as *Gibbons v. Ogden*, *McCulloch v. Maryland*, *Marbury v. Madison*, *Munn v. Illinois*, the *Slaughterhouse* cases, and the so-called *Insular* cases, and a long line of others of almost equal import, have had profound and lasting influence in the formation, of our national institutions and even upon the methods and tendencies of our political thinking.

What Justice Riddell said suggested to my mind a number of books and articles which have appeared lately which might well be grouped under the general topic of the Economic Characteristics of Law, and I shall venture to say just a few words about that general subject.

Only a few weeks ago it was my duty, scarcely my pleasure under the circumstances, to read a book entitled "A History of the Supreme Court of the United States." This work was based on some profound investigation, but it seemed to me to be anything but what it purported to be. Far from being an impartial history, it seemed rather to have been written from a point of view and with a bias and seemed to come to the conclusion that all of the judges of the Supreme Court—and it was really a series of biographical sketches—if not corrupt in a financial sense at least had been led to the decisions with which their names are connected by purely economic and grossly selfish motives. Another book of somewhat the same type appeared shortly before that, a book worthy of much more serious attention; that was Mr. Brooks Adams' *Social Revolution*, in which he too made rather extreme statements, as to the influence and power of what is called the predominant class, in enforcing its views and entrenching its interest in our law.

And still another book, that of Dr. Beard, of Columbia University, on much the same subject, a book written impartially, after investigation, and yet coming, it seems to me, to extreme and therefore erroneous conclusions with reference to this same

matter. For example, the statement is made in that book that certain clauses in our Constitution were adopted through the influence and votes of those members of the convention who would be most benefited by the protection of public securities, a statement which sounds reasonable, perhaps, because I think we all admit that economic influences must necessarily enter into law and to a great extent the interests which are predominant at any given period will influence and color the law. But when one comes to examine some of the specific statements made, he finds for example that, as a matter of fact, in connection with the subject I have just indicated, a majority of those members of the Constitutional Convention who had large holdings of public securities voted against the clauses which were supposed to protect those securities. That statement of mine is not original, I ran across it the other day in a review of this book by Professor Lantané of Johns Hopkins University.

It scarcely requires demonstration before an audience of this kind that John Marshall and Justice Story did not unite in a wicked conspiracy whereby one traded off to the other, so to speak, decisions in cases pending before that great tribunal, in order that John Marshall might be enriched by the great Fairfax estate and that a relative of Justice Story might profit through certain other proceedings.

It is scarcely necessary in an audience of this kind to say that Mr. Justice Harlan was by no means a reactionary defending the so-called "interests." Neither I think would it be necessary to say much in refutation of the charge that Mr. Justice Hughes, during the time he was conducting the insurance investigation in New York City was doing so for the purpose of wrecking the insurance companies and selling them or having them sold at a low cost to a client.

These are extreme views which are finding their way into the public press and into books which appear with the imprint of great publishers, views which sometimes have the color of truth only and which, therefore, are all the more dangerous.

Now I am quite sure it would be carrying coals to Newcastle to go on with a category of this sort to an audience made up largely of lawyers and their wives and friends, but two or three more things may be said in this same connection not wholly without profit, possibly. We have heard a great deal lately about the fellow-servant doctrine which unquestionably has been carried to absurd lengths and has been a means of injustice under present conditions. But when it is said that rule of law was deliberately and corruptly devised by the courts in aid of certain interests, the statement is made without historical examination and does not, in fact, coincide with the truth.

A distinguished legal scholar has recently published an article on that very point, in which he shows that this doctrine had taken form long before the present characteristics of our society had begun to develop and before the "interests" could have been responsible. It is a matter of common knowledge to all lawyers that the classic statement, though by no means the first statement of this doctrine of fellow servants, was made by the great Chief Justice Shaw of Massachusetts along in 1841 or 1842.

Another writer has shown that the doctrine of contributory negligence often classified with this same topic, was no invention of the bar and the bench in recent times. In fact, an English author has undertaken to trace the origin of these doctrines back to the time of Homer and Aristotle, and to later Roman and Greek law. Undoubtedly the general principle on which both these doctrines rest was in effect long before the present period of controversy.

Another book occurs to me in this connection. Roe's "The Judicial Oligarchy." Doubtless the courts have often felt obliged to undertake to do things which perhaps they had better have left alone, but to imply from that fact that the bench has, at least as a general thing, consciously, deliberately, usurped authority for selfish or improper purposes, is unjust. No one who recalls the measured and solemn words of the great Chief Justice Marshall in cases where he was forced to decide great questions involving matters of political interest, can think for a moment that he intended to

usurp anything. He faced the task which was before him and his colleagues upon the bench with greatest reluctance and sense of duty.

And so in our own time one recalls the words of Mr. Justice Harlan in *Smyth v. Ames*, as he faced the difficult task and the immeasurable possible consequences of deciding upon questions involving railroad rates. I can not think the court willingly undertook that function. We forget sometimes that these functions not known in judicial life in most other countries are, by the very nature of our government and our institutions, forced upon our courts. Who can question that in this day, despite some recent controversies, the very logic of events, the historical precedents of our forefathers combined to compel the Supreme Court of the United States and other courts to undertake this delicate function of passing upon the constitutionality of legislation. A difficult task, a dangerous task; but who can doubt that it was forced upon us? And why is it, one may ask, that so much administrative work of all kinds has been thrown upon the courts in recent years? Who can doubt the reason for it is that after all is said and done, after all that can be said in just criticism of our judiciary, it yet remains a fact that of all the departments of our government it has undeniably best stood the test (applause) and most nearly met reasonable expectation?

I have had the pleasure at this very dinner of talking with one or two members of courts who have spoken with regret of the necessity of undertaking functions of this sort. The courts have not invited them.

Now this is really a rather novel undertaking for me. I do not have the privilege often of talking to assemblages of this sort, but the truth is that this is the first time when such opportunity has presented itself that I have not taken advantage of the opportunity to try to show the other side of the picture. At bar associations, so far as I have been privileged to attend them, I have tried to point out the many and glaring evils in our law, some of them at least, and have urged reform. And it must be admitted that in this present period the great task which does confront the bar is

the task of reform within. Unquestionably we need to socialize our law, need to bring it into touch and step with the times, to make it respond to the economic and social demands of the present moment. It has failed to do so in some cases, rather glaringly, probably, but I believe that any one who reads the history of law will hold this to be inevitable at recurring periods in the history of legal institutions. It has always been so, and in this period of tremendous economic change the law has simply failed to make the rapid advance which industrial society has made and there is consequently friction and complaint. But whatever the explanation, of course we must meet the criticism. It is our duty to attempt to repair conditions. It is our duty to reform and improve procedure, about which we have heard so much today.

So it seems to me the bar at the present moment is in the position which military men I suppose would regard as one of great danger and of extreme difficulty. We must face defects and dangers in two directions. We must look to reorganization within, to the removal of evils which do exist. That perhaps is our greatest task, but along with that goes this, the correction of misconceptions among the people which if they are spread much more widely than they have been in the past, are likely to poison the minds of the entire nation and to lead to radical and unwarranted and to sweeping changes, perhaps to the destruction of some of those great principles of law and government which through centuries of time our race has tried and which, at least until now, it has found good. This, perhaps, is as delicate a work, as important a work as the other. Is the bar equal to it? Can it undertake this work? Can it without passion, but calmly and patiently and with the knowledge which is derived from the study of the history of our institutions, as well as of the present economic and social conditions, point out the truth and thus preserve those things in our polity which are good? (Applause.)

THE PRESIDENT: There is, unfortunately, a minor chord in these festivities. Your new President, Judge Kramer, of East St.

Louis, is not present, having met with a misfortune. I will ask Justice Vickers, of our Supreme Court, to give us a word for the new President. (Applause.)

JUDGE VICKERS: I only rise in response to this request to say that the absence of Judge Kramer from this Association requires an explanation. He has been one of the most faithful and loyal members of the Association for at least twenty years, and of all the sessions that he would delight to attend, this one perhaps would have been the most pleasant to him. But unfortunately on the very day that he was ready to start for Chicago to attend this Association he received a telegram from his brother's wife in El Paso, Texas, that his brother, a lawyer who had gone from Kansas to El Paso for the purpose of taking some depositions, had met with a serious accident and that it required Judge Kramer's presence immediately at El Paso, requesting him to come there to the assistance of his brother. And he went to Texas on the day he should have started to this Association. I have not heard anything since then. I do not know any of the details of the injury nor how serious it is. Judge Kramer did not know when he left how his brother had been injured or the cause of it. He simply had the telegram that he was very seriously injured and to come at once.

On behalf of Judge Kramer and the East St. Louis bar I want to thank this Association for the honor that has been conferred upon our local bar association by electing him the president of the Illinois State Bar Association for the present year, and I assure you that of which you do not need any assurance that in Judge Kramer you will have an efficient and a devoted and a loyal officer of this Association. I thank you. (Applause.)

THE PRESIDENT: The term of my own office is drawing to a close. I beg you to indulge me while I merely thank those who have co-operated, during the past year, for their forbearance, their indulgence and their loyalty throughout the entire year. And now, following the custom which has obtained in the Association for many years, and in the absence of our loyal friend, Judge Kramer, I will ask the Vice-President, Col. Nathan William Mac-

Chesney, to receive this symbol of authority. Hold it fast, enforce the law, follow the precept of the preacher in the mining camp, "enforce the gospel if you kill every man in the gulch," and remember that the Macs are great people. (Applause.)

MR. MACCHESNEY: Mr. Chairman, Ladies, and Gentlemen: I will detain you but for a moment. First, I want to thank you for the honor which you have done me in electing me Vice-President of this Association. I am sure we all regret that Judge Kramer can not be here tonight to receive this gavel, because, as I have been associated with him during the past year upon the Executive Committee I realize how deep has been his interest in the purposes and objects of this Association.

And neither can I let this opportunity pass to pay tribute to the high sense of duty, the persistence in advancing professional standards, that has characterized our retiring President in all that he has done this past year.

This seems to have been a Canadian evening to a large extent. They have a different way of referring to admission to the bar there which to me, while not significant of the difference between the American and the Canadian bar, is significant of the changing relation of the Bar to the people. It is still the custom in some states, in fact, it is the constitutional right in some states to practice law. In Canada they *call* men to the bar; here we *admit* them to the bar. We admit them to a privilege; in the old days perhaps the privilege of personal aggrandizement; today, if still a privilege, the privilege of personal service to others. But is not the Canadian form after all the better one, because there they call; call to the service of the community, so that we as members of the bar shall not alone be officers of the court, but assume the place which we should have as leaders, the intellectual leaders, if you please, of the movement for social progress. And, now, it becomes my duty, in the absence of him who should be here, to declare this, the thirty-eighth annual meeting of the Illinois State Bar Association, adjourned. (Applause.)

"Auld Lang Syne" was then sung.

PROGRAM

OF

THIRD ANNUAL MEETING

OF

THE ILLINOIS STATE SOCIETY OF THE AMERICAN INSTITUTE OF CRIMINAL
LAW AND CRIMINOLOGY.

FIRST SESSION.

3 P. M., Tuesday, May 26th.

College Room, Hotel La Salle.

1—Annual Address by the President.

"The Criminal, Who Is He, and What Shall We Do With Him?"

William N. Gemmill, Judge Municipal Court, Chicago.

2—Business Session.

DINNER.

7 P. M., Tuesday, May 26th.

East Room, Hotel La Salle.

Members of the Bar Association, their wives and friends are invited
to join the members of the Illinois State Society in this dinner.

SECOND SESSION.

9 A. M., Wednesday May 27th.

College Room, Hotel La Salle.

1—"The Execution of the Penalty." Edmund M. Allen, Warden Illinois
State Penitentiary, Joliet.

Discussion.

Dr. Charles R. Henderson, International Prison Commissioner for
the United States, University of Chicago, Chicago.

Albert C. Barnes, Judge Appellate Court, Chicago.

C. B. Adams, Superintendent St. Charles School for Boys, St.
Charles.

2 "A Brief Review of Criminal Cases in the Supreme Court for the
Past Year." Harry A. Bigelow, Professor of Law, University of
Chicago, Chicago.

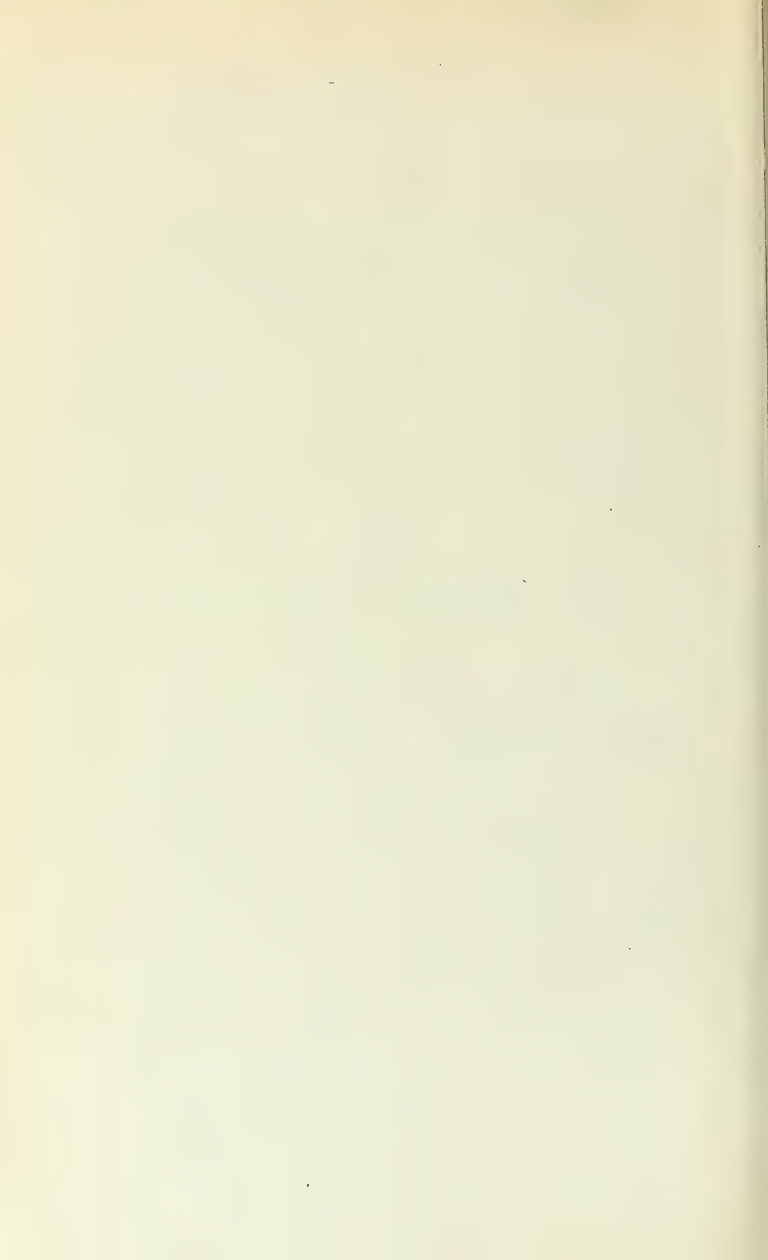
Discussion.

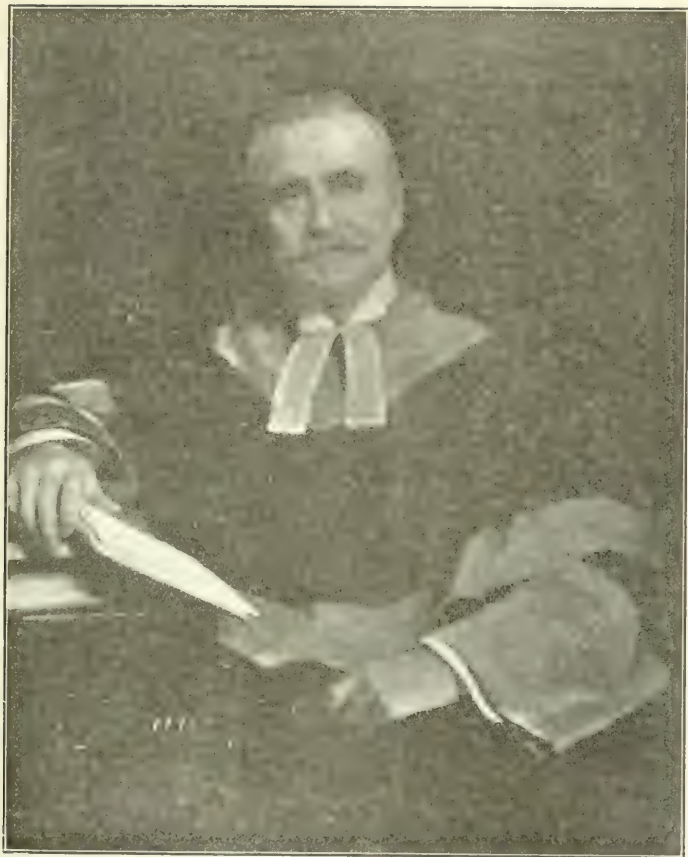
George B. Gillespie, of the Springfield Bar.

O. A. Harker, Dean of the College of Law, University of Illinois,
Urbana.

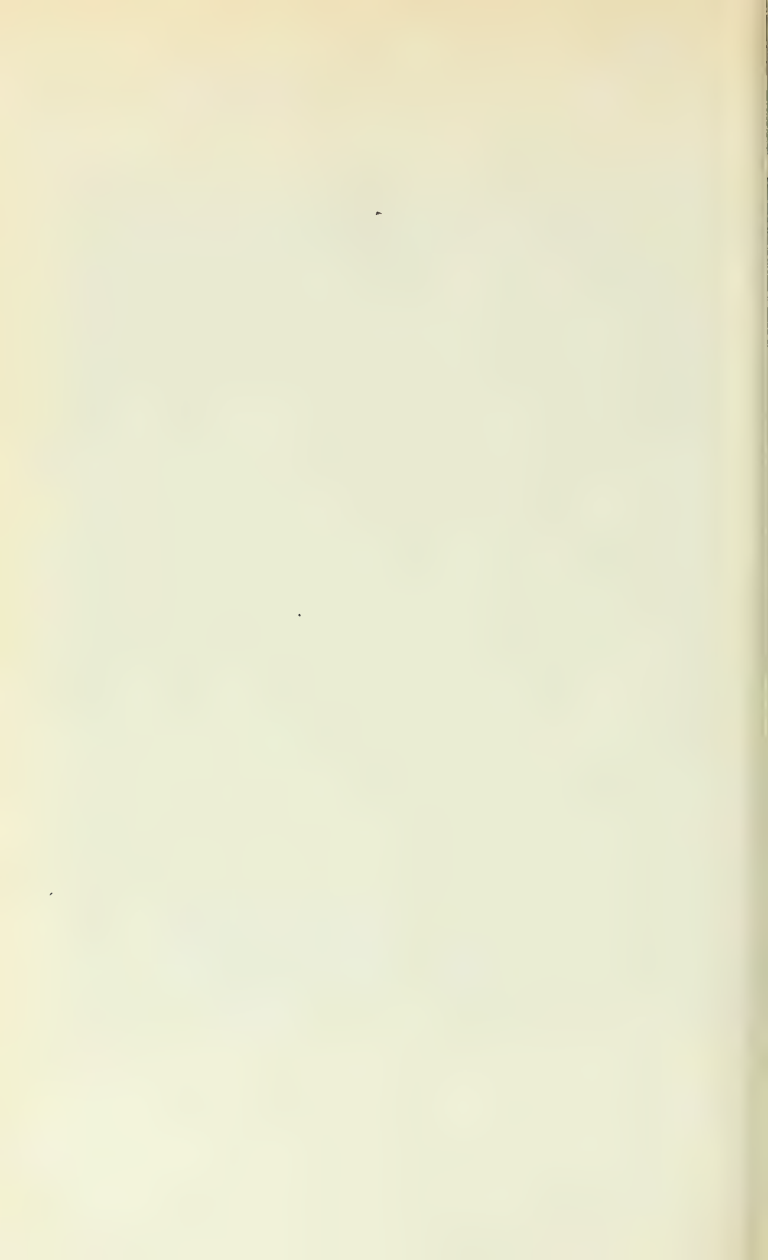
Under the foregoing resolution the following committee was appointed:

Judge Edward Osgood Brown, of Chicago,
Judge Julian W. Mack, of Chicago,
Judge Albert C. Barnes, of Chicago,
James H. Matheny, of Springfield,
Col. Nathan William MacChesney, of Chicago.





WILLIAM RENWICK RIDDELL,
Toronto, Canada.



THE ADMINISTRATION OF JUSTICE.

WILLIAM RENWICK RIDDELL, OF TORONTO, CANADA.

The officers of your Association have paid me the very high compliment of asking me to address you at this your annual meeting; and I can think of no subject of more interest than that in which we are all concerned, The Administration of Justice. And, believe me, I am fully conscious of the great honor you have thus conferred upon me, however unworthy may be its recipient.

I have no intention in what may be said to hold up our methods, our Courts, as an example to be followed, much less to criticise your methods, your Courts or the results you may attain. My remarks will be mostly of a general character; but if there be found anywhere in them aught which will be helpful toward the ends we all have in common, I shall be glad.

It would seem that very shortly before historic times, man lived in anarchy, vindicating his rights and avenging his wrongs by his own strong right hand; when "wild in woods the noble savage ran," he knew no law but his own desires, no master but him who held him by force; everything was to him right that he liked, wrong was what he disliked. The unutterable cruelty and misery of those times may escape the poet, but never the sociologist or statesman.

When man began to be gregarious and formed clans and septs, it was soon recognized that no community could prosper whose only rule was the rule of might, where each was judge of what he was entitled to and was permitted to acquire and keep all he could. The desires of one crossing the desires of another, one must give way or be made to give way—the weaker slain or disabled by the stronger, by so much weakened the community and laid it the more open to conquest and destruction by other communities—while even if matters were not pushed to that extremity, the rankling sense of injustice which corroded the heart of him who had been forced to submit, was itself a deleterious element.

Accordingly it must early have been determined that conflicting interests of two members of the same community must be determined by an independent tribunal. At first, no doubt, the King or Priest—the words were long synonymous—the wise or kenning Elder—was the Judge. For long the Judge received inspiration from the god, not uncommonly the eponymous hero, in each particular case, “every case was treated on its own merits,” and the decision of the god was sought on the particular case without regard to general rule. The litigants receiving the judgment of the god, The Great Master, must needs be satisfied that what was said to them was as the Great Superior wished—He could always say *sic volo, sic jubeo, stat pro ratione voluntas*. Even when the doctrine of special inspiration grew shaky, the judge continued to adjudicate on the particular case before him almost if not quite irrespective of what he had decided in a previous case and with little or no thought of how he might decide in a subsequent, principle being far in the future.

Nor did this wholly cease to be the case when record or tradition gathered the “themistes” which had been pronounced, and a family or order of functionaries, priests—call them what you will—were the guardians of past judgments and considered as entrusted with knowledge of the will of the gods. Something like principle did indeed creep in—something approaching a general rule was gradually appreciated, but still there was not law in our modern sense.

That was practically the condition of the Indian when America was discovered: (it is said “the Indians had few laws but they were well violated”); and it is the condition of many tribes of so-called savages today. It is a great mistake to suppose that there is more litigation in Chicago or in Toronto in proportion to population than there was among the Iroquois or is among the wandering tribes of the desert. The difference is that in these, every law suit is a thing by itself, in those every law suit is connected with thousands of others which have preceded it. There is no satisfactory evidence of the advantage of one method over the other in doing substantial justice.

In ancient Athens principle did not quite make its way, did not do its perfect work. Much written law there was but more unwritten; and every citizen, every dicast, had his own view of what in reality was the law—in great measure what he wished to be law was law, and he decided accordingly.

It is the glory of the Roman civilization that thence arose the full theory of law as a principle, as a collection of binding precepts. The influence of Roman or Civil Law upon the whole judicial, legal concept of the modern world, it would not be easy to exaggerate.

Our Teutonic ancestors had their own law, cruel, illogical, tyrannical in many respects; but they were inordinately proud of it, and we, their descendants, are by instinct and education prone to look upon it with not much less pride than they.

The history of English civil law for over eight centuries has been in great measure a history of conflict between the crude law of the Teuton and the polished law of the Roman; the more civilized law, with but few set-backs, has been all the while acquiring a greater and greater ascendancy. Now in England and in Ontario, where the rules of Equity and of Common Law conflict, the rules of Equity prevail; the rules of Equity which are practically all derived from the law of Rome.

From the earliest times, the tribunal to decide rights might be of a temporary character and *pro hac vice*, or it might be of a permanent or quasi-permanent nature. In the former case, however disguised, it was in substance a board of arbitration; in the latter, by whatever name it might be known, it was a court. The Court has grown upon the Board as a means of settling disputes, and is now triumphant; and whenever an arbitration is preferred to a Court decision it is a disgrace either to the substantive law, and therefore to the legislature, or to the practice, and therefore in most instances to the Courts—in every such instance the law has proved a failure and the Courts incompetent.

In international disputes indeed the progress just spoken of does not appear. When two nations do not determine their rights by the cannon and bayonet, by wounds and blood and death, by

the elimination of their bravest and strongest, "wet eyes of widows, broken old mothers and the whole dark butchery without a soul," they have heretofore in most cases formed a temporary Board and left it to the Board to decide without any principle but "Get all you can, give up what you must." Too often it is found that the ape and tiger still survive in that jungle.

Within the nation, we of modern times have decided that our rights must be determined on principle—on principles that can be certainly known, for they can be expressed in writing.

In what I am now about to say, I speak in the main of civil litigation. I shall later on speak of criminal justice specially.

The function of the Court is to determine rights according to principle, that is, according to law; and from one point of view, in so far as it does that, in so far as it is a success and no further.

It is not enough that the Court shall give litigants their rights according to law. The Court was invented to prevent strife by determination of right by and through a just and impartial referee; and unless it is believed that the Court is just and impartial, it fails in a most important part of its object and loses much of its value.

Moreover such a course should be pursued that those who have disputes shall be desirous of having them decided on principle; that is, the superiority of the professional agent of justice, the Court, should be manifest over the non-professional, the Board of Arbitration. The medical profession should feel no more regret at the prevalence of resort to the quack than the legal profession at prevalence of resort to arbitration.

The relative importance of two great ends of the administration of justice, that is, determination of right according to principle, and satisfying the public that justice is properly administered, may depend upon circumstances. In a judgment of my own it was said: "all magistrates should remember that while the most important thing for them is to be impartial and right, it is not much less important that litigants and the public generally should believe in their impartiality and rectitude," *Rex v. McArthur* (1906), 8 O. W. R. 694. Nay, I am not at all sure that

it is not sometimes more important that the litigants and the community shall think justice is being done than that the decision shall be strictly in accord with precedent. Not many years ago, in conversation with a retired Justice of the Supreme Court of the United States, I ventured to express the opinion that no harm would have accrued if two-thirds of the cases in that court had been decided the other way: he answered, "If you leave out the constitutional cases I should agree, and indeed I think you might increase the percentage considerably." The modesty of one not thoroughly acquainted with the Constitutions of the United States and of the States of the Union, one who lives in a country without a Constitution (and likes it), prevented me when speaking to an authority on these, from questioning my friend's exception. I venture, however, here to submit to you the consideration—what harm would have been done if Daniel Webster had failed in the Dartmouth College case? Your law would have been different, but would it have been worse? Is your law better for the people at large—and it is the people it must always have in its care—than if it were as in England and Ontario? Are even your corporations during the sittings of Congress and Legislature any more comfortable than ours or those in England? And after all, has the effect been much more than to oblige legislatures to introduce into private charters a clause reserving the power to repeal or alter them—just as it is said that practically the whole effect of the Statute of Uses was to introduce five words into conveyances?

Did the decisions, or either of them, on the constitutionality of taxation of incomes do any good? and would any harm have been done if they had been the other way? No constitutional amendment would have been necessary, but what of it? Would any one have been injured if he were validly taxed under the constitution as it stood, rather than under an amendment? And does it feel any more pleasant or hurt any less to pay an income tax than if it had been levied under the document of the Fathers?

Did the "Dred Scott" decision settle anything? Perhaps it hastened an inevitable conflict, but did it do more? Was the conflict not inevitable under any decision, and was it rendered

less intense, costly, bloody, terrible by the decision actually given?

Most hesitatingly and meekly (as becomes an outsider) I venture to suggest to you that all the decisions of the Supreme Court are overborne in importance by the one decision of the Senate of the United States when that body refused to dismiss Andrew Johnson; for in all human probability there will never be another impeachment of a President of the United States for the reason that he does not agree with the majority of the people or of Congress; the President is as firmly seated on his throne and is as truly a monarch for the term for which he is elected as any king or emperor in Christendom. Benjamin Robbins Curtis' success before that tribunal was of vastly more significance and of vastly greater importance to the United States and its people than would have been success in the Supreme Court when he delivered the superb dissenting judgment which will continue to be the greatest glory of his name so long as Courts endure and lawyers reason.

Does not the decision of the New York Court of Impeachment that a Governor of that State, their two year King, must behave himself according to their views of honesty and propriety before as well as after his inauguration, overtop in importance the decision of the unconstitutionality of employers' liability legislation? Did this do more than call for an amendment, inevitable if the people wanted it? And what possible harm could have been done had the decision been the other way?

It is the regular and conventional thing to speak of the great principles of the common law as something sacrosanct; to say that the common law is the perfection of human reason. So far as these principles are identical with enlightened reason, with the teachings of the moral law, there can be no complaint. But how do they differ from Justinian's triad? *Præcepta juris sunt hæc. Honeste vivere, alterum non lædere, suum cuique tribuere.* The maxims of law are these, to live honorably, to injure no one, to give every one his due. Any principles outside of these, of what avail are they? And what harm if the rules laid down by the

Courts had been different? The laws of real estate at the common law no civilized nation would now endure; in your country and in mine, the Legislature had to intervene so to change them as to make them consistent with common sense. What advantage is it that (or if) the laws of distress by landlord for rent be retained? Who would now lay down the "Rule in Shelley's Case?"

All that has been saved the common law is Legal Fiction, Equity and Legislation; and all our pity for those who did not inherit or adopt the common law of England, your fellow Americans in Louisiana, my fellow Canadians in Quebec would laugh at. Outside of the fundamental principles of honesty, there's nothing either good or bad in law but thinking makes it so; most of our admiration for the sages of the law, Bracton, Littleton, Coke, is as well founded as admiration of the middle age schoolmen and no more so. Extraordinary ability, profound learning, consummate subtlety, characterize both classes; but no one would be much the worse if they had devoted their attention to heraldry or the tracing of pedigrees; or if in eight out of ten cases they found the law diametrically opposite to what they did find.

Howbeit, for good or for ill, the law is in most instances settled; the rights of the people are to be determined according to fixed rules laid down either by binding decision or by legislative authority. The Court must necessarily be conservative; the Court has no more power to change the law as it finds it than to eliminate the word "not" from the commandments; the people are entitled to their law as it stands and must submit to it whether they like it or not. We probably all agree that (speaking generally) the very first consideration underlying, surrounding and going beyond all others, is that justice shall be done according to the existing law. If the people do not like the law let them change it, the Court cannot change it for them.

God forbid that any Court should be influenced in its judgment by the opinions of litigants or of any other person whomsoever. Circumstances may and often will be such that judgments will not only be unpopular, but they may even be repugnant to

the sense of justice of the community; and yet the Court must give precisely these judgments.

But that does not imply that the Court should so act as to give rise to the impression among the people that it is wholly indifferent to a just public sentiment. Lord Mansfield could say: "I wish popularity," and he showed himself a good public servant when he said so, if a better when he added, "but it is that popularity which follows, not that which is run after, it is that popularity which sooner or later never fails to do justice to the pursuit of noble ends by noble means. * * * *'Ego hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam putarem.'*" (I have always been of this opinion—that unpopularity gained by doing one's duty is a glory not a disgrace.)

Now justice is not administered in the abstract, it is justice to the litigant in the particular case that must be sought; and the one essential of a Court is that the law is administered in the particular cases brought before it.

A story is told of an importer who had been required to pay \$800 as duty upon goods which he had brought in. He claimed that no duty was payable, and paid under protest. He brought his action which made its way by slow degrees to the Supreme Court. In that Court all the Judges gave learned opinions, but none said whether the unfortunate merchant was to have his money returned, and the Court was shocked to hear a troubled voice, "Do I get my \$800?" *Se non è vero, è ben trovato.*

The Court is not (at least in my country) the master of the people, but their servant, supported by them for their own use and in their service; the judge is paid by the people to do their work, and just as soon as the Court is not worth, directly or indirectly, what it costs, it should be abolished—directly in adjudicating upon the rights of litigants, indirectly in preventing civil wrongs, turmoil, assaults, thefts, trespasses, in the time-honored phrase "maintaining the King's peace."

A Court does not exist for itself; it is not an end in itself. A Court is an evil and the less it is called into play the better

for the community unless the evils arising from this course will be greater than those arising from the more frequent exercise of its functions.

When Congress was proposing to give American coasting vessels a privilege in the Panama Canal not granted to other ships, and Britain made a protest, basing her claims upon treaty (I am not going to discuss the rights and the wrongs of the matter, the American people are guardians of their own honor and need no advice or opinion from me or any other non-American), my friend of the United States Supreme Court said to me: "I hope that question will go to The Hague." I answered, "I hope not;" and when he wonderingly asked why, I said, "I hope there will be no necessity, I hope that the nations will settle the matter without litigation, there is no saying what heart-burnings and discontents may arise over the decision; we in Canada still remember the Alaska Boundary Award, and no one has a right to expect a repetition of the extraordinary good fortune which followed the Fishery Award at The Hague the other day when each party claimed substantial victory. A settlement between the parties themselves is infinitely to be preferred to a reference or litigation of any kind." My friend was not wholly convinced; he was an American and consequently thought that "there is nothing like a court."

The court was made for man, not man for the court. No considerations of dignity, tradition, *esprit du corps* should ever induce a judge to forget that he is a servant of the people, paid by the people to do the people's work—if he fail to appreciate this elementary truth and to act upon it, he is apt to be an unfaithful servant, a dishonest recipient of wages paid for work which he fails to do. Fortunately this class of judge is rare; there is no "I Won't Work" associations for them.

The Court does not exist for the exhibition of the personal dignity of the judge. Personal dignity in a judge may be a valuable asset to the community which he serves, it may help to preserve decorum and thereby advance public business; but it may be a detriment if of a certain kind. If the back be so stiff that it cannot bend itself to work, and if the business of

the Court must be delayed because the judicial dignity craves twenty-three hours rest of the twenty-four, the public can very well manage to get along without it. And the dignity which is so concerned with looking for slights and "contempts of Court" that it has little time for anything else, is better placed elsewhere than on the bench. Let a judge do his work faithfully, promptly and courteously, and his dignity may generally be left to look after itself.

Tradition is sometimes of much value; but it is tradition of what is good and useful; a traditional method of doing business is convenient and not infrequently is the best available method; but a tradition, if there be one, of dilatoriness or inefficiency were better forgotten. What is old is not necessarily good, nor what is new, necessarily wrong.

Perhaps the most frequent complaint made anywhere of the administration of the law, is its delay—the law's delay. One of the promises wrung seven centuries ago from a reluctant king by a resolute aristocracy, was *Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam*; to none will we sell, to none will we deny or delay right or justice. He who delays justice, denies it—a truth profound though it lies on the very surface, patent and obvious, so patent and obvious indeed that it is often overlooked.

A very short time ago I read an able article by an eminent judge of one of the United States, in which he said that delay if not too long is a good thing in litigation. I then absolutely repudiated that doctrine, as I do now; I assert most confidently that every unnecessary delay is wrong if not asked for by the parties concerned. The ideal method of determining rights would be for the parties when difficulties arose, at once to lay the facts before a judge and have an immediate decision. We in Ontario have that method in substance where there are no facts in dispute but the only question is the interpretation of a written document whether will or contract. This cannot always be done, there are generally in dispute facts upon which the rights depend; and these facts must be determined in some way. The

very speediest method of bringing them to a determination consistent with thorough investigation is the best; and a litigant has a legitimate ground of complaint if there is a day's delay beyond the time really necessary.

Delay in bringing a case to trial may be due to the people themselves; their representatives may not have constituted a sufficient number of courts, elected or appointed a sufficient number of judges; or they may have clogged the courts by an intricate and dilatory practice. In that case the people cannot complain; they have the courts and the practice they deserve. If they want something better, let them do something better. It is idle whining about an evil which is due to one's self and one's own negligence or indifference: "whatsoever a man soweth, that shall he also reap."

The delay may be due to a vicious practice which the courts have the power to change for the better; in that case the courts are derelict in their duty if a change is not made. Not rashly—changes in well understood and well established practice are not lightly to be made. I have no high opinion of the "wisdom of our forefathers"—they were probably much the same manner of men as those of the present time, and "there is a great deal of human nature in man;" but any institution that has stood the test of time and fairly well fulfilled the object of its being, deserves to be treated with respect even by our non-reverent generation. Still everything must give way to the public good, reverence for antiquity included.

Speaking generally, if either litigant cannot compel the trial of his case in six months from the institution of proceedings, there is something wrong, and he has a right to complain. There may, of course, be trouble in locating witnesses and procuring their attendance, there may be intricate and protracted experiments to be made, or other causes for delay, but in the general case no want of a sufficient number of judges, no intricacy of practice, no skirmishing of lawyers, should prevent the trial of a case within the time I have mentioned.

It is a matter of the most profound astonishment to those of my Province to see the great delay to which some of the States of the Union submit; our people would not stand it for a year, there would be such an outcry in the press and elsewhere that no government would refuse to bring in, no legislature refuse to pass, amending and corrective legislation.

How is a case to be tried?

There may be constitutional provisions which must be obeyed or the legislature may prescribe. In Ontario there are very few cases in which a jury is of right; in most instances the presiding judge is master of the situation, he may try a case with or without a jury as seems best. At Toronto in 1913, in the lowest court, the Division Court, not one per cent were tried with a jury,* in the next higher, the County Court, 18% were tried with a jury, and in the Supreme Court, 26%. In most of these cases the jury were not allowed to find a general verdict but were confined to answering certain questions of fact submitted to them by the judge, he reserving everything else to himself. In more than thirty years' experience I have known of only two appeals against the action of a trial judge in striking out a jury notice—both unsuccessful.

The saving of time—and wind—is enormous. The opening and closing speeches of counsel to the jury and the charge of the judge are done away; in argument there are very few judges who care to be addressed like a public meeting and quite as few who are influenced by mere oratory—all indeed must *ex officio* be patient with the tedious and suffer fools gladly. Vehement assertion, gross personal attacks on witnesses or parties, invective, appeal to the lower part of our nature, are all at a discount; and in most cases justice is better attained, rights according to law are better ensured. Moreover during the course of a trial a very great deal of time is not uncommonly wasted

*The official report of the Inspector of Division Courts for 1913, just to hand, shows that in 1913 the total number of suits entered in these Courts in the whole Province was 63,675, and the number of juries called for 117, a little less than one-fifth of one per cent. The whole amount claimed in the suits brought was about two and a half millions; the cost of the juries averaged a few cents over \$10.

in petty objections to evidence, in dwelling upon minor and almost irrelevant matters which may influence the jury, wearisome cross-examination and reiteration, etc., all of which are minimised before a judge.

But it is never to be forgotten that the courts belong to the people, and the wishes—even the prejudices—of the people must be borne in mind. If for any reason the body of the people were to come to the opinion that a judge trial was not a just trial, justice would not be satisfactorily administered if that form of trial were adopted. There I leave the matter.

Very often during the course of a trial, facts will come to light which give a new turn to the case; some courts are so hampered, or so hamper themselves, that they cannot go outside of what the lawyers have already put on paper; they cannot “amend the pleadings,” and great injustice may result. Whenever by any hide-bound practice a court cannot do justice on the facts because a lawyer has made a mistake, there is a failure in the elementary duty of the court. In the ideal state, every liberty will be given to both parties to bring out all the relevant facts, and judgment will be given on those facts according to the very right and justice of the case even if lawyers make fifty mistakes and a hundred omissions.

Law is not a game where the smartest man wins, it is a serious attempt to determine rights no matter by whose mouth or with what ingenuity—or want of it—they are asked.

The courts are sometimes said to have as their function the making of good lawyers. Perhaps so, but just as one function of a hospital is to make good doctors—a mere by-product of an institution whose primary and fundamental object is to heal the sick—so while that of the court is to give a litigant his rights, there can be no harm in the by-product of good lawyers. There can be no harm in a doctor learning while he is practising in the hospital, but the doctor who puts in the forefront anything but the cure of the particular patient entrusted to his care is derelict in his duty, recreant to his profession. Comparison with this of the duty of a lawyer is obvious; the place to learn law is the

law school and the library, the court is a place to do business in, to determine "Do I get my \$800?"

I almost tremble when I suggest that the "good lawyer" of popular conception is no great acquisition to the community any way. Let me not be misunderstood. I pity the lawyer who knows nothing else than the daily routine of a law office or a court, who has become a mere tradesman, handicraftsman; but just as I pity the student at the university who reads only enough to pass on. Law is a liberal and a learned profession, and there are very few fields of knowledge which may not be of advantage in enlarging the mind and understanding. Even deep reading in the older authors will do no great harm if care be taken not to fill the mind with antique views to the detriment of common sense, what I have frequently described as "cluttering up the mind with law." The fact that law is a learned profession does not diminish the significance of the fact that the lawyer is a business man, hired to do his client's business.

A well educated Bar is a great desideratum; a self-respecting Bar is of great value—a Bar, which never forgetting the rights of the client, does not think it inconsistent with duty to assist justice by courtesy to opponents, by civility to witnesses and others, by respect to the court, by a due regard to the exigencies of public business. The noisy showy barrister, who plays to the gallery, seeks to impress his client or the populace with his ability and importance by discourtesy to others, insolence (more or less veiled) to the court, interminable oratory to the jury, is an evil, a public nuisance. That class will always be met with where the people want it. No one can expect total self-abnegation and disregard of his own interests even in a counsel; and "for people who like that sort of thing, that is the sort of thing they like."

What about appeals?

The ideal method would be for the losing party to take all the evidence, papers, etc., in the case, at once before the appellate tribunal, and, both parties being heard, the case to be disposed of without delay. The nearer the practice is assimilated

to that ideal system the better, other things being equal. The Appellate Court should, if required by the amount of business, be continuously in session with only such intervals as are necessary to consider the cases presented. The material before the Appellate Court should be all the material in the trial court; this should be got before the Appellate Court at the earliest possible moment and with the least possible expense; the proceedings should be as little technical and complicated as possible, and in this court as elsewhere justice delayed is justice denied. Of course there will often be circumstances causing delay, there may be facts alleged or statements made at or after the trial which must be investigated; people will die and even the counter-irritant of a law suit will not always keep them alive. Leaving aside special circumstances and speaking generally, if a losing litigant cannot have his appeal heard and disposed of in three months from trial there is something wrong. In a certain country, a Chief Justice declined to sit in an appeal because judgment might not be given before the expiration of his term, more than three months distant; that fact and the circumstance that it excited no astonishment will furnish their own commentary.

Moreover there are often trifling errors (generally against technical rules) at the trial; even judges are not exempt from the imperfections of humanity. An Appellate Court should pay no attention to such defects unless some injustice results. There may be some fact left unproved or later discovered. Why should not the Appellate Court allow the fact to be proved before itself? What is the sense in sending a case down for a new trial with all its risks, expense and trouble?

There is one failing with which courts of appeal are very frequently afflicted; they are apt to forget that the main object of litigation is the determination of the rights of the litigants before them, and to imagine that what they are for is to write dissertations on the law. To a lawyer, there is no stronger temptation than to follow up a point suggested in a case and to exhaust the law on such point, although it is not really material in the case under consideration. There can be no objection to that

course, but it should not be followed so as to delay a decision unduly and thereby deprive the litigant of his right to speedy justice.† What is important is, "Do I get my \$800?"

†I produce to you the list of our Appellate Division, the Court of Appeals in Ontario, for the May, 1914, sittings.

There are eighty-one cases on the list. The judgments from which these appeals are taken were delivered as follows:

Before January 1, 1914.....	7
In January, 1914.....	5
In February, 1914.....	14
In March, 1914.....	44
In April, 1914.....	11

In all..... 81

Of those before January 1, 1914, two are cases of a Municipal Street Railway which is being reorganized, and all parties desire time to complete the financial arrangements. The parties have had several opportunities to argue the appeals if they so desire, and the cases are kept on the list *ex abundanti cautela* for fear the arrangement may fall through. Three others have stood by arrangement of counsel; and one to enable the appellant to procure a preliminary order from a county court judge, *persona designata* under the statute. All of these have had at least one chance to be argued. The seventh is a case *sui generis*. A wife is suing her husband and conducting her own case. Two motions have been made by the defendant to dismiss the appeal for want of prosecution, but the court has extended the time. Much of the evidence at the trial is said to be irrelevant, and the plaintiff is finding difficulty in extracting what is material. She scorns professional help and is perhaps looking for a grievance. At all events we thought we should not cut her out of an appeal.

Of the five decided in January, 1914, two were delayed by illness of counsel, and counsel on the other side agreed to let the cases stand; two by reason of omission of stenographers to get out evidence in time; and in the fifth, counsel mislaid his papers and the other side consented to delay. All these have had at least one chance.

We do not allow cases to stand from month to month without inquiry. From time to time all cases looking stale are called on to be spoken to; and if the reporters are found derelict they are brought to time. If the parties are not really intending to go on with the appeal promptly, it is dismissed.

During the May sittings all the appeals from judgments delivered in January, 1914, have been disposed of; of those before January, the two about the Street Railway still stand; one other will be disposed of June 1, another June 5; all others have been heard.

There have been added to the May list 3 cases in which judgment was given in March.

We have heard

Of those in February, 11 leaving 3

Of those in March, 35 leaving 12

Of those in April, 9 leaving 2

In addition to those fully heard, two involving disputes between the Municipality and private individuals have been heard in part and stand for a proposed settlement.

And what law should be administered?

Most of the English-speaking peoples have the tradition of the fundamental distinction of Law and Equity. This distinction is historical and arose from our ancestors having a law of their own of which they were inordinately and stubbornly proud and tenacious, "*Nolumus leges Angliæ mutare*" said the barons on a memorable occasion; and *nolumus leges Angliæ mutare* they continued to think (some indeed consider that the barons have not ceased to be intensely conservative even at the present day). The gross and palpable injustice done by these venerated *leges Angliæ* became intolerable, and after legal fiction had failed to permit justice to be done in the law courts, Equity was invented. "Equity mitigated the rigor of the common law" is the conventional and euphemistic way of putting it; but this cloaks the infamies which the common law enjoined or permitted. The lawyer was not till comparatively late entrusted with this new weapon; the churchman was the early chancellor. But it got at

length into the hands of lawyers and became as technical and as formal as the common law whose rigor it was to alleviate. These two systems of law ran along side by side, administered by different courts for centuries, and the English lawyer came to think that this division subsisted in the very nature of things.

It is hard to dislodge inveterate and traditional opinions even when they are wholly without solid foundation. The colonial lawyers raised on English precedents as pabulum, absorbed the English idea and it stuck. I have before me as I write a letter on the subject of the Courts of Law of Upper Canada addressed to the Attorney General and Solicitor General in 1847. This was written by a member of our bar of the highest standing, one who was afterwards Chancellor and then Chief Justice of Ontario. Addressing the "Chief law officers of the Crown for Upper Canada upon a subject interesting alike to the profession and to the country—the due administration of justice," and at a "time when changes appear to be contemplated in some of our Courts of Justice," he argues that "law and equity ought to be considered as distinct systems, and that they are so considered and kept apart in England, is, perhaps, one of the best provisions of our Constitution." He approves the statement of Lord Eldon as to "the necessity of that separation of Courts of Law and Equity which so mainly contributes to the complete and effectual administration of justice to an extent and in a degree such as are unknown and must be ever unknown where that separation is not effectually made and observed." In Upper Canada we had got along without a Court of Equity till 1837, and there was in 1847 talk of getting rid of it. Mr. Spragge (the writer spoken of) deprecates such a course, disputes the statement of those who say "we did very well without it before the Court of Chancery was established," for, he says, "the common law was never meant nor is it calculated by itself to form the jurisprudence of a country. Without being tempered by equity law, it would often work injustice, and in its actual operation in this country the application of its rules did work injustice until a language began to be used in our Court of King's Bench which would have sounded strangely in the ear of a common lawyer in England." He thinks

that without separate courts "the law * * * would degenerate into an uncertain hybrid system neither common law nor equity, but an incongruous compound of both, so that no man could tell what his rights are." "We must * * * have English law, a combined system of law and equity, or we must abrogate the English law, throw our whole system of law to the winds and adopt the civil law. But were so mad a scheme proposed methinks Upper Canada would answer as with one voice *nolumus leges Angliæ mutare*." This reasoning was adopted, and as at the Parliament of Merton so at our Canadian Parliament "*Omnes comites et barones una voce responderunt quod nolunt leges Angliæ mutare quas hucusque usitatae sunt et approbatae*."

If any lawyer were asked to lay down a code of laws for a new community he would be thought insane if he laid down two codes, one of laws to govern the people and another, to modify and to that extent to nullify the first; and yet because from historical reasons that system grew up in England, many lawyers thought it a necessary system. Even in 1817, some could not conceive of the legislature combining the two systems into one, and directing the fused system to be applied in all courts. And so we had law and equity for over thirty years longer. In 1881 when a simple provision was made that where the rules of law differ from the rules of equity, the rules of equity shall prevail, and this was applied to all courts, many were the mournful laments for the departed glory of our jurisprudence. Rachel weeping for her children could be as easily comforted as the "equity lawyer" when he found that a proceeding to foreclose a mortgage could be taken by writ in the Queen's Bench Division, or the purely common lawyer when he found that the beloved principles of the common law were ruthlessly subdued to the alien rules of equity. I have myself heard a practitioner, still living, curse what he called the "confusion" of law and equity; but time is the great assuager of grief and the change has vindicated itself. No one now would think of going back to the old system.

This fusion of law and equity has had something to do with the gradual decay of the jury system.

A word or two as to the administration of criminal justice.

The abominable cruelty of the English law, whether the common law as interpreted in early times by the high placed judge or made in later times by the high placed member of parliament for the governance of the lower classes—in either case a mandate in the vast majority of instances of the superior to the inferior—revolted the humane. Rules were extended or invented to save the shedding of blood for petty or even serious offenses. The law was brutal, and its brutality was mitigated or evaded by the ingenuity of less blood-thirsty judges. Trifling defects, errors of form, omissions to prove immaterial allegations, matters of no importance whatever were laid hold of to prevent a judicial murder. Consequently the result of a prosecution became very much a matter of chance; criminals looked upon a verdict of guilty as a bit of bad luck. A chaplain of Newgate of the time has left an awful account of the view taken by prisoners of trials, an account which haunts the reader as a horror for years.

Accordingly, the prosecution of an alleged offender became a kind of sport. The prisoner had so much of a start, so many proceedings were forbidden to his pursuers, he might double and dodge, and in the end, in spite of facts wholly proved, might escape. It was a kind of glorified fox hunt, the quarry having a much greater chance than a fox.

This was about the condition of the law in England when the United States branched off and when Upper Canada was given legislative independence. Both took the law with them. The rights of the accused, the protection of the accused, gave the watchword; and some courts have not forgotten it yet. In not a few courts the prisoner has so many and so sacred rights that no one else has any, the State included. Instead of a criminal trial being a solemn inquiry by the State into a crime alleged to have been committed against it, a criminal trial is apt to degenerate into a game, a play, a spectacle for the curious and

a subject for lurid newspaper writing. That provision made by the State for its own protection that no one shall be punished unless and until convicted by a competent court is made a cloak to shelter those who have undoubtedly committed crime; the pettiest of all petty technicalities are invoked as though they were the most profound of principles, on the violation of which the heavens should fall. Time seems not to be considered of importance in many jurisdictions; and in one the members of the bar say openly that a conviction for murder is but the beginning of the criminal trial.

Solemnity and formality in a criminal trial have great influence upon the criminal classes. Severe punishment has not at all the same deterrent effect as certain and speedy punishment. Many a degenerate or wilfully wicked person would be willing to be made the central feature of an eight days' or eight weeks' show with a good chance of evading punishment.

Is all this good for the State?

Once again, if the people really want that sort of thing they must have it; but do the people really want it? Of course the criminal classes, the potential criminal, the lawyer who is paid by the length of time he can make a case last or who seeks glory from technical ingenuity or florid rhetoric, the yellow and near yellow paper and its readers, all are in favor of it. But the man who has to pay for it, the sober-minded citizen who takes an interest and a pride in his country, who is jealous of her honor and reputation—what of him? and is he not to be considered?

If a criminal trial is a game, well and good. The fox hunter who was expostulated with on the cruelty of his sport said, "The men like it, the horses like it, and nobody can be certain that the fox does not like it." But even fox-hunters pay for their game out of their own pocket, and if a fox does get away now and then, there is no great harm. We in Canada are too poor to be willing to pay for such a sport and too busy to be willing to waste weeks on an investigation for which days or even hours are ample. We think that except in very grave offenses, such as mur-

der and the like, an accused should have the option to be tried by a judge and without delay, instead of waiting for a jury sittings. If one charged with crime be desirous of trial by jury we allow him a copy of the jury panel in sufficient time to make inquiries as to any objection to the jurymen, and when a trial is set we insist on it being proceeded with, with due diligence and reasonable speed. The first time I met your ex-president, Mr. Taft, he spoke of the intolerable delay in criminal trials in the United States. I told him that a short time before, I had gone to a Canadian city to hold the Assizes on the same day that a few hours further along the same line of rail but across the international boundary, a judge began to get his jury in a murder case; that I had tried four criminal cases and seven civil cases, and was home in Toronto before my American brother had half his jury. I told the New York Bar Association that in my thirty years experience I never saw it take more than half an hour to get a jury. Let me add that I have never but once heard a proposed jurymen asked a question about reading newspapers, forming an opinion, or anything else. I have never known even a murder case (except one) take four days; very few indeed take more than two; none tried before me has taken as much as two full days; and medical or other experts are not allowed to drag out proceedings. We think four on each side enough except in special circumstances and we keep these well in hand.

Is fair play not the only natural right of one accused of crime? It may be that in some courts the proceedings are protracted by the gladiatorial spirit. The prosecuting counsel feels that he has a brief for conviction and that he is vanquished and disgraced if he fails in procuring it. He strains every nerve to that end, stretches the law and colors the facts; and if, *per fas aut per nefas* he hears the jury say "Guilty" he is triumphant. I venture to think that that theory and the practice based upon it are wholly vicious and debasing. In an investigation by the State into an alleged offense against itself, the counsel representing the State has the plain duty to investigate; and the State not desiring that an accused be pronounced guilty

if in fact or in law he is not, it is the plain duty of the prosecuting counsel to bring before the court and jury all the facts and all the law—what helps as well as what incriminates the accused.

The wholly brutal system of the judge being the most determined and effective prosecutor has long gone out; the only excuse for it was that not seldom the judge had been the investigator and had become certain of the guilt of the accused. Howell's State Trials are appalling reading at the best; and a judge who would act now as the most venerated of the sages of the law acted in the past would be cursed and despised of all men.

Has not the spirit of these judges descended to some prosecuting counsel?

In Canada, the theory is that the Crown Counsel represents the State. He has no concern with whether the accused is found guilty or not. His whole duty is performed when he has brought out all the facts by direct evidence or by cross-examination of witnesses for the defence and has summed up to the trial tribunal fairly all the facts. If the judge or, in case of a jury trial, the jury think no case has been made out, that is no concern of his; he is not to blame. Of course, human nature is human nature. Counsel will instinctively want to fight the counsel on the other side. It is difficult to be impartial, particularly when one has a strong conviction of the guilt of the accused; but if counsel wilfully concealed or failed to bring out facts favorable to the prisoner's innocence, if he unduly pressed for a conviction, if he were to urge unfair arguments to the jury, he would lay himself open to unfavorable comment of his professional brethren and the public, as well as to stern rebuke by the trial judge. The method of candor and fair play brings more convictions than the opposite course. A jury like fair play, and if they see a prisoner is not getting it, they are not at all unlikely to feel resentment and to "help the under dog." I am an old Crown Counsel, and I speak whereof I know.

Speed is called for in an appeal in criminal matters. The deterrent effect of punishment varies inversely with the delay in punishing; while if there is to be a new trial, it should be as

soon as possible, witnesses disappear or "forget" more quickly and effectively in criminal than in civil matters.

Punishment should follow swiftly; we think, in the Dominion if a Canadian murderer is not hanged within a year of his crime he is justified in complaining of being deprived of his just rights given him by Magna Charta.

There is abroad in some quarters a feeling of unrest and dissatisfaction with the administration of justice, civil as well as criminal. It will not do to say that this is due to machinations of demagogues, to the ambition of politicians out of office. No demagogue or dissatisfied politician can long make any considerable number of the community believe in what has no foundation in fact. The causes of dissatisfaction should be sought out and if possible removed.

Some part of this may be due to a misunderstanding of the true function of the court. It seems impossible for some, and those not the most ignorant or least American, to understand that the court does not make the law. Just as it is said we have in our bodies remains now dormant and useless, even harmful, of organs which were alive and active in the reptile stage through which we are told our race has come, so there is away down in many minds the relics of what was real when the early judges laid down the law to suit themselves. As the nightmare which frights the bravest before a danger which does not exist is said to be a reminiscence of the terror of the ancestor, the naked savage running through the dark forest of old, fleeing a very real danger, so the present nightmare—if it is right to call it a nightmare—may be, at least in part, an atavistic reminiscence of what was once a grim reality. It may be that means can be found and used by the Bar or others to correct such misapprehension.

But is that the only reason? Of course substantive law is for the legislature, but there are many ways in which the Court can do much to make the administration of laws accord with the requirements of the people.

Conservative, Courts must needs be from their very constitution, but that does not imply that they must be unsympathetic to

amendatory measures, permissive or imperative. Dignified they should be, but that does not imply *otium cum dignitate* with *otium* ninety-five per cent of the prescription. Deliberate, too, but that does not mean so slow that before judgment is given the litigant is dead or hope deferred has made the heart sick. Independent of public opinion every judge must be, but that is not synonymous with indifference to the manner in which the public receive his judgments and the opinion the people have of his honesty. Like Lord Mansfield, while he should despise the popularity that is run after, he may well prize that which follows. He is called upon for imperative public reasons to avoid the very appearance of evil and see to it that nothing in the manner of his judgments is unnecessarily offensive to his fellow-countrymen, however unpalatable the matter may be. That judge received no commendation who, while he feared not God, neither regarded he man; and no judge may use the oburgation, so well known as attributed to a multi-millionaire, "the public be damned."

The position of a judge is one of the very highest to which a man can be called in a free country; the influence for good of an upright and conscientious judge is incalculable; and when he exhibits defects of manner, lack of prudence and decorum, contempt of the commonalty, he grieves the judicious and does as much or nearly as much harm as if he were ignorant of law, indifferent to the soundness of his decision, partial in his treatment of the Bar or litigant and subservient to sinister interests.

It is a matter of frequent comment and almost unbounded any suggestion of improvement or grudging in giving full effect to wonder to those under another system that in these United States, judges who achieve the Bench through a method wholly repugnant to the sentiment of the British peoples are so almost universally found to be of high legal attainment, sound judgment and independent mind. It is a matter of pride to all English speaking lawyers that the method of election or appointment has been found to be wholly immaterial; the honest lawyer, who the satirists says is the noblest work of God and about the scarcest, is

not scarce on the Bench of the Union or any of its component States.

It is a matter of congratulation that it is almost unknown that even the bitterest critic charges want of learning, ability or honesty in the occupants of the Bench. It is, however, alleged that dissatisfaction has been felt with an apparent indifference to the demands of an advancing society, an unsympathetic attitude towards the masses. So far as that means that the courts should change the law laid down for them by decision or statute, the criticism is unjust and cannot be accepted. If it means that rules are allowed to crystallize into technical language so rigid that the letter can defeat the underlying spirit and purpose, "the case is different." The application of rules "must correspond with the practical necessities of the times." At least that is so in my democratic country; and I gladly adopt the language of the great lawyer whom many of you heard last summer in Montreal, the Lord Chancellor, Viscount Haldane, delivering judgment in the House of Lords, (1914) A. C. at pp. 37-38.

How far those in a land in which a system different from ours prevails can go in making the rules "correspond with the practical necessities of the times," I cannot say; but is not some of the real foundation (as distinguished from the political pretext) of this agitation, based upon the conviction that the practical necessities of the times have not been considered?

Be that as it may, it is perfectly certain that in every free country the people will and must have their way in the long run—with courts as with all else. It is the part of the patriot and the statesman to see to it that that way is the right way, and that the right way is found with the least possible delay. The right way in litigation implies justice cheap, speedy, full and certain: and anything in the constitution and practice of the courts which is not conducive to that end is wrong and must be amended; if by the courts themselves, so much the better, and the sooner the better, but in any case it must be amended.

We live in an age of unrest; the principles underlying institutions are being investigated as never before; nothing is taken for granted; the motto is "you have got to show me;" the ever

iterated and re-iterated question is "Why?" "Why?" "Why?" The courts should not and cannot hope to be an exception. "If our virtues did not go forth of us, 'twere all alike as if we had them not." The administration of justice is on its trial. What will be the verdict?

So long as there is a moral law governing the universe, so long as its affairs are governed by the Divine Law, the verdict must be certain. With a Bar alive with a keen sense of public duty, with a Bench whose members can say with truth and pride, "I have judged the people with righteousness and the poor with judgment—judgment have I laid to the line and righteousness to the plummet—I have executed the judgment of truth and peace in the gates—touching the righteousness which is in the law I am blameless—I have done no unrighteousness in judgment—I did not respect the person of the poor nor honor the person of the mighty, but in righteousness did I judge my neighbor—for I did not respect persons in judgment but heard the small as well as the great and was not afraid of the face of man—I did not wrest judgment nor take a gift, nor did I ask for a reward—I did not take bribes and pervert judgment—but I judged righteous judgment, the judgment which cometh from the Lord"—the verdict must be "Well done, good and faithful servants."

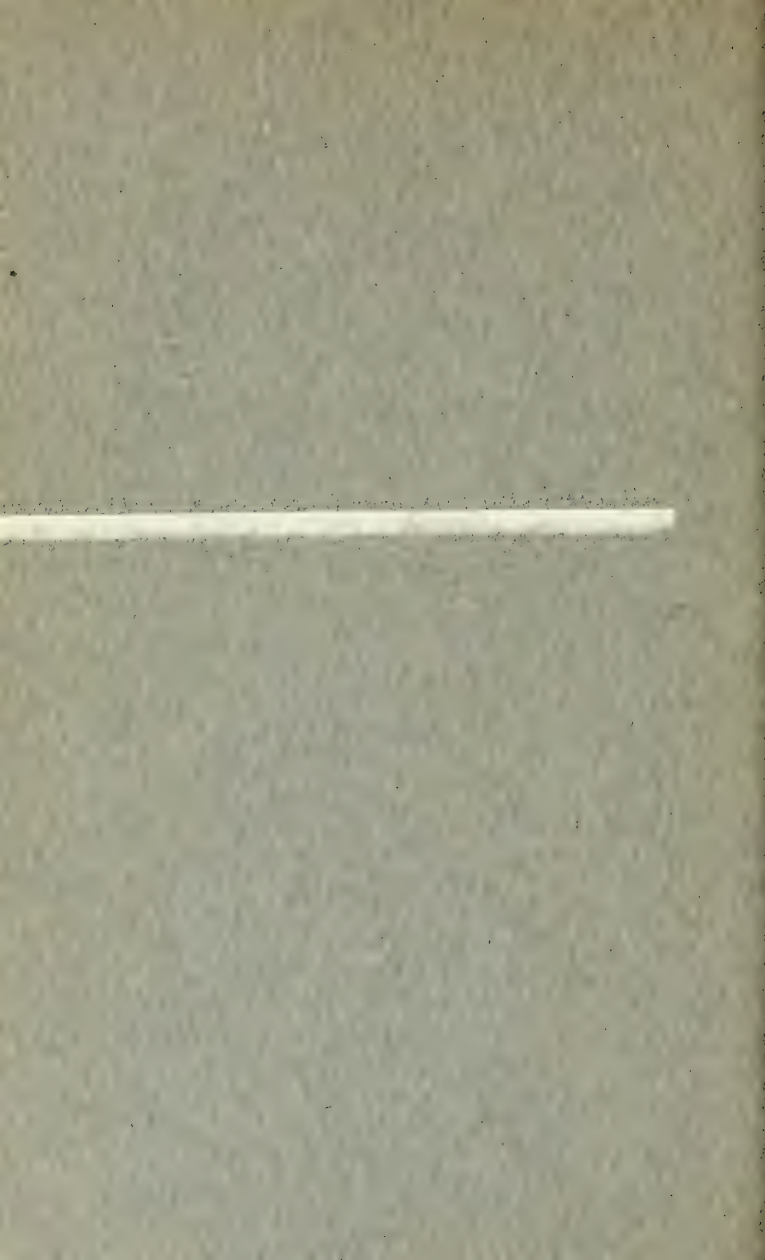


The United States and Canada

THE COMMENCEMENT ORATION,
SYRACUSE UNIVERSITY,
JUNE 14TH, 1911.

—BY—

The Honourable Mr. Justice Riddell,
KING'S BENCH DIVISION, H.C.J.
ONTARIO



The United States and Canada.

The Commencement Oration, Syracuse University, June 14th, 1911.

THE HONOURABLE WILLIAM RENWICK RIDDELL, L.H.D., ETC.

*Mr. Chancellor, Fathers and Brethren, Ladies and
Gentlemen:*

When I say that I am glad to be here—now—I am not simply using the language of mere convention.

I am come to you from the adjoining nation and from a University which her sons delight to honour, calling her, as she indeed is, the largest University under the British flag; they do not in their devotion go so far as to say that she is the greatest University under the British flag—as yet—but with the optimism which characterizes the Canadian, they consider even that to be but a matter of years—few, it is hoped.

I bring you greetings from that land and that University, and wish you every possible blessing.

We are told across the Lake, that there are millionaires at the back of this University; and if that is so, we rejoice. But it may be but an invention of the enemy.

“Are millionaires common in America?” asked a stranger. “They are,” answered the American, “most of them.” If millionaires are responsible for

the buildings of this University, it is a matter of regret that they are not more common—in the one sense. No person common in the other sense could have conceived their erection or brought it about in beauty and harmony as they exist. And we might well pray that more of such benefactors should be found to aid in the cause of higher education by furnishing chaste and lovely temples for its pursuit.

But whatever and whoever may be at the back of Syracuse University, I can bear personal testimony that at its head there stands a man—

“A man with head, heart, hand
Like some of the great simple ones gone,

* * * * *

Who can rule and dare not lie.”

—a man who lives by old George Herbert’s precept,

“Do all things like a man, not sneakingly,”

and who “girt by friend or foe,” says “the thing he will.”

Was it not Garfield who said, “Dr. Mark Hopkins at one end of a log and a student at the other—that is a University”? How much more may we say, “Dr. Day at one end of this institute of learning and these four thousand students at the other—that is a great University”?

And I most heartily and sincerely congratulate him and you on the progress made by this University, believing and appreciating as I do that advance in true culture and true learning in this University and in this State cannot be without its influence, not only upon this great Union, but also upon the world at large, and not least of all upon my own beloved Canada.

I am to speak to you of the United States and Canada.

On the northern shore of Lake Erie, our magnificent inland sea, are many projections of the land to-

ward the South, as it were stretching out Canadian hands to the sister country. And on one of the best known of these stand two tall shafts of pine, topped with verdure never failing. These grow from the same soil and spring from the same root; above, they are distinct and wholly self-contained. The pillars stand near together, yet never clash—the lighter, more conspicuous portions of the trees do indeed intermingle: and ever and anon, when stirred by gale or tempest, their branches chafe and fret in noisy commotion. But with the passing of the storm passes also the fury of contending branch: with the calm comes again the peaceful and harmonious interlacing of limb and twig and needle—and the oscillating shaft nodding to its sister is gladdened by the peace above. Long years have these sisters stood on the shore of our Lake, and long have they symbolized the two peoples living on its opposite shores.

For the United States and Canada are from the same soil, have grown on the same continent; they are sprung from the same root and glory in the same ancestry—and while the lighter part of each has, when stirred by the tempest of passion, jarred and fretted and chafed, the solid portion has, in the main, stood firm; and when the storm was over and quiet reigned, those who had wrangled and lashed resumed friendly communion and intermingled one with the other in peace and harmony.

“Behold how good and how pleasant it is for brethren to dwell together in unity.”

The histories are full of war and battle—tales of bloodshed and suffering are told to child and adult—but who has told the story of the long and abiding peace on each side of the longest international boundary in the world?

Four thousand miles stretches the line between the United States and Canada: and never a fortification or a stronghold—the so-called forts are mere glorified farmhouses, the earthworks like deserted potato-pits

—the petty garrisons kept at a few points do no more than play at soldiering—and red coat and blue are rather brothers than members of the army of two nations.

And long may it so continue—yea, *in aeternos annos*.

This peace is, I venture to assert, due to recognition of our kinship—and it did not exist at the beginning of the continent's history. For Canada was always a source of great anxiety to the Colonists to the south while she was French—and from the very first there was the most fixed determination not to allow the French to come within striking distance of “the Lord's own people” who spoke English and were Protestant.

Even so early as 1613 the Colony, led by a Jesuit father and sailing from Honfleur, which had settled on Mt. Desert (the Island off the coast of Maine, now so well known) was attacked by the Virginian, Captain Samuel Argall, who has been called “a sea-captain with piratical tastes”—and he carried off fifteen French in chains, and set the rest adrift on the stormy sea. Virginia sent her ships north and destroyed every vestige of French occupation of the Island, “visited” Ste. Croix and burnt Port Royal.

The expedition in 1628 and 1629, led by David Kirke (Kertk), who might be fairly described in the same language as Argall, cannot be credited to the colonies: but it is safe to say that it was made for their sake. Kirke's conquest of Quebec had but little effect upon the history of either part of North America; though Quebec was British for three years, the peace of St. Germain-en-Laye (1632) gave France back her own—her New France.

Thereafter, for a century and a quarter, the English colonist supplied the Iroquois with arms and ammunition, wherewith to commit havoc on the Frenchman—while the French, not to be behindhand in their thoughtful care for the white man, gave arms

and ammunition to the Francophile aborigines, Huron and Algonquin. English Indians invaded Canada and ravaged that land, as French Indians invaded New England and ravaged that—and there can be little doubt that there was not much to choose between them, although, indeed, we hear more about the Indian slaughter of the English-speaking Americans—all the English colonists could write—and most of them did.

New York did not become English in allegiance till 1664, when Colonel Richard Nicolls took possession for the Duke of York; but she lost no time in showing herself English, both in feeling and in enterprise (for the short period of renewed Dutch rule in 1673 and 1674 may be disregarded), and indeed she had been more than half Anglicised before her change of flag. In the decade, 1680-1690, both English and Dutch in New York endeavoured by presents, and especially by furnishing gratis, guns, powder and lead, to induce the Iroquois to war against the French—and it was only the view of the Iroquois that it would be better first of all to destroy the Christian Indians, allies of the French-Canadians, that saved New France from a most devastating and horrible warfare at that time—the subjects of James II hesitated themselves to attack the subjects of his French friend; but they had no compunctions about doing by Indians what they would have liked to do in person. “*Qui facit per alium, facit per se*” does not always apply internationally.

But on the 13th February, 1689, William and Mary were proclaimed King and Queen of England; and the long course of Stewart truckling to France came to an end.

In 1690, the Grand Alliance of Germany, Spain, Holland and England was formed against Louis XIV; and this continent did not fail of its share of war. The Le Moynes set out from Montreal against New York and Hertel from Three Rivers—and these

captured and destroyed Schenectady and Salmon Falls; while a third expedition from Quebec under Portneuf captured and sacked Canso.

But Boston and New York were awake. A Conference was held at Albany at which the invasion of Canada by land and sea was determined upon; and the Kennebec backwoodsman, William Phips, was appointed to lead the retaliatory fleet. He failed to take Quebec, though he had under his command men from Massachusetts, Connecticut and Plymouth. Sons of Connecticut may, if they choose, account for this failure by the fact that their country had withdrawn part of her contingent to protect her own northern settlements.

The force invading by land composed of sixteen hundred New Yorkers who went by Lake Champlain had no better fortune at Laprairie.

Then the colonists urged the mother country to send an expedition for the conquest of Canada; and in 1692 it was decided to grant this request. Accordingly, in 1693, a fleet was organized to reduce Martinique first, and thereafter Quebec; but it was so reduced by sickness that the project had to be abandoned. Indeed, this fleet did more harm to Boston than to Martinique, for the sickness introduced by it was most destructive—after killing about two-thirds of the sailors and soldiers, it proved in Boston to be the most malignant ever known: so much so indeed as to drive many of the inhabitants away from the city. And they were Bostonians; and the city they were leaving was Boston.

Then the volcano slept—though mutterings were from time to time heard, and the earth was seldom still. In 1709 both land and sea forces were sent against Canada; and at length, in 1711, an advance was made against Quebec with a failure still more pronounced and even disgraceful. In this expedition, which set out from Boston under Sir Hovenden Walker, with Imperial and Massachusetts troops,

everything was mismanaged. Ships were wrecked and hundreds were drowned. Quebec was never even reached—the Admiral thought, or at least said, that the wreck was a merciful intervention of Providence to prevent more fatal mischiefs. Perhaps it was—had it not been for that wreck, there might now be no Canada.

Acadia was being occupied, and the hinterland of the colonies was becoming important—the whole Lake George-Lake Champlain district was the seat of inextinguishable warfare, guerilla and otherwise, between the two irreconcilable people; and at last in 1754 Wolfe was commanded to take Quebec. The colonies were called upon to furnish 20,000 men, and they did furnish 17,500: Massachusetts, 7,000; Connecticut, 5,000; Rhode Island and New Jersey each 1,000; New Hampshire, 800, and New York, 2,680. The relative importance of the colonies is shown by the number of men raised, Connecticut supplying many more than New York, and Massachusetts nearly three times New York's quota (but of course Massachusetts included what is now Maine).

The belief which had become firmly established throughout Canada that Quebec was unassailable by water, proved not quite fallacious. Quebec fell, but it fell assailed by way of the Plains of Abraham. Ticonderoga was avenged. The colonies had their wish and the toast was fulfilled, "British colours on every French fort, post and garrison in America."

It is a satisfaction to know that the three American grenadiers captured by the French at Quebec were not burnt alive as their friends feared they would be. The 2nd and 3rd battalions of Royal Americans were with the besieging army and did their duty manfully; and no difference was made between them and the other English taken prisoner.

And now took place what the more acute observers had foreseen, and some had openly prophesied. When the fear of starvation or privation is removed, the

young man may safely, if he is so inclined, treat the old folks lightly—while they in turn cannot think of him as anything but a mere boy wholly unfit to govern himself or his household. The English (which by this time had become British) Colonies, relieved from the ever-pressing fear of invasion from the alien North, had time to consider their relations with the mother country. So long as the next day might bring a hostile raid by Frenchman or Indian, the assistance of British troops was very desirable, and greatly desired. Nor was there much complaint even if these troops had to be supported by the colonists whose homes they protected—and that though these colonists had not the full control of the money raised for that purpose.

But when there was no longer any fear of French soldier, civilized or savage, as all to the North was now become also British, the case was changed.

It is a part of the very life of English-speaking people that they must govern themselves—for well or ill. Swarms leave the mother hive: these set up a new hive for themselves, governed after the ancestral model, indeed, but self-governed. There is no such phenomenon in English-speaking colonization as in the ancient Greek—nor were these colonists chosen by lot or sent from an inferior grade of the people; they came of their own choice, and many of England's best and bravest found their place in the ranks of the venturesome settlers of the American wilds.

I do not know whether you consider it a matter of pride or not—probably not—but it must be said that New York was not the leader in opposition to the claims of the government of King George—perhaps Massachusetts was the most determined and self-asserting. Whoever the leader, arbitrary acts were met by stubborn resistance; and at length a deplorable, though perhaps inevitable, war broke out between mother and daughter; and America claimed independence.

Canada was never long absent from the minds of the leaders of the revolted colonies. It was always a desideratum that Canada should join the Union and so round off the federation of States. Canada, British, might be dangerous to the colonies now anti-British, as she was when anti-British to them still British. The Continental Congress meeting at Philadelphia issued an address to the Canadians, filled with turgid rhetoric, and more fitted as an argument to philosophers than an appeal to simple people like the inhabitants of Canada. The address wholly failed in its object. Not that the French-Canadians had become enthusiastic British subjects—they had refused to furnish the Governor, Sir Guy Carleton, with provisions for his troops. The address printed in Philadelphia reached very few Canadians: fewer still could read: and those who could read knew of an address to the people of England by that same Congress complaining bitterly of favour shown to the Canadians as a gross betrayal of Protestant principles and inveighing against the toleration of Popery, “that blood-thirsty, idolatrous and hypocritical creed.” Catholics who had been repeatedly and in the most solemn manner assured of the free exercise of their religion under the British flag were not likely to choose rather the fellowship in allegiance of those whose representatives so thought and so spoke of their beloved Church and most cherished beliefs.

Montgomery and Arnold were sent North against Montreal and Quebec—the erratic Ethan Allen had made a dismal failure. Montreal was taken, and Montgomery hastened to assist Arnold at Quebec. Montgomery died and Arnold failed.

To Montreal during its occupancy by the Americans came three Commissioners, Benjamin Franklin being one, taking with them a French printer from Philadelphia: and they issued appeals to the people—in vain. The priests, who could read, were immovable—they had been treated with at least re-

spect by the British, they were treated with contumely and even with physical harshness by the Colonials—the British had paid in gold for all the stores taken and labour exacted by them, the Colonials, if they paid at all, paid in paper—and the paper was repudiated by Congress. It is said that the cheating and trickery of the “Bastonnais” is still a tradition in parts of Quebec after a century and a half, as the Angevin Kings of England are still remembered and execrated by the peasants in parts of France after a lapse of six hundred years.

But while all parties recognized that it would be for the advantage of the United Colonies that Canada should join them and so cease to be British, George Washington was sufficiently clear-sighted to recognize that it was better for his country that Canada should be British than that she should become once more French. For, he said, France with a foothold on the left in Canada, on the right in Louisiana and holding all the West of the Continent in the rear of the new nation, would be a greater menace than a British Canada. It is not too much to say that, even then, it was, at least by Washington, appreciated that “blood is thicker than water”: he frowned down Lafayette’s plan to invade Canada with the aid of troops obtained from France.

The revolted colonies wholly failed to carry Canada with them; but they achieved independence for themselves—the wretchedly-conducted war came to an end.

The law-abiding and law-seeking genius of the race asserted itself—for I maintain that the Anglo-Saxon is essentially a lover of law, and of law as a means of deciding disputes. There was, of course, no room in the preliminary articles of 1782, or even in the definitive Treaty of Peace of 1783 for anything but a statement of the rights of the contracting parties: but when time showed that they were not exactly agreed as to the meaning and import of the words

they had employed in common, the case was different. A legislature may declare the rights of parties by a Statute, or parties may make a written agreement; but if they disagree as to the meaning of the words employed by the legislature or by themselves, that meaning must be found, fixed and determined by some tribunal—unless, indeed, the parties fight it out physically.

War is the international equivalent of trial by combat—and war even yet is not wholly obsolete: “ ’Tis true ’tis pity, and pity ’tis ’tis true.”

But these two English peoples, the insular and the continental, had more sense than to rush to war to determine their respective rights under their agreement. And, accordingly, the celebrated John Jay, when sent to have the rights of the American people better defined, as well as to arrange matters which had already led to some trouble, and might lead to more, willingly agreed that the rights as declared by the former treaty should be submitted to a tribunal for decision—while he secured a further agreement as to other matters of international irritation. His treaty, that of 1794, has justly been called the starting point of international arbitration. (Not that arbitration had previously been unknown among the nations, for, as all students of history know, among the states of European Greece and of Asia Minor, arbitration was not at all uncommon. A most interesting article—or, indeed, volume—might be written upon this topic; and I venture to hope that some of the Peace Societies or the Carnegie Trust will have the history of international arbitration, ancient and modern, written at no distant date.) But the Jay Treaty is the first in modern times of an international arbitration between great nations, and, consequently, it deserves all the fame which it actually enjoys.

The negotiation of this Treaty, while it forms, perhaps, Jay’s best claim to immortality, was fatal to

his honourable and natural ambition to become President of the United States. Politics were then as bitter and as unjust as at the present day: and charges against Jay of selling his country were made and believed in a generation which listened with patience and almost with credulity to the charge of defrauding the nation made against George Washington—for even he was charged with dishonestly taking public money.

Posterity has been kinder and more just.

By the Treaty of 1794, it was arranged that matters in dispute should be referred to arbitration—and (with one exception) since that time to this, more than 100 years after, there has been no armed conflict between the mother country and her loyal colonies on the one hand, and the separated colonies on the other—a splendid proof of the sense of justice and right on either side.

By Jay's Treaty, it was referred to a Board of Arbitrators selected by the two governments with another selected by these, to determine what river was meant by the "Ste. Croix" in the Treaty of Peace. Three arbitrators were sufficient for that. But there were claims for money by British subjects and American citizens: and with that keen sense of the importance of money which has never failed the Anglo-Saxon since the times in which he assessed, at a fixed money rate, the value of the life of all from king to villein, five arbitrators were to pass upon the money claims. The boundary arbitrators failed, and so, too, did the arbitrators on the British claims. The latter claims were in 1802 compromised at £600,000—while the former dispute continued to trouble the nations for forty years longer. The boundary was a matter directly affecting Canada, as have been most of the matters leading to international dispute, negotiation and arbitration.

Then, as for many years thereafter—and indeed in some remote parts even at this day—Americans were

under the impression—nay, the profound conviction, that monarchy is of necessity tyranny and that Canada was ground down under the iron heel of oppression—and some Americans had sufficient courage and spirit of self-sacrifice to help her to be free. Canada has an awkward way of taking such efforts seriously, and of dealing sternly with those who interfere with her: accordingly when, shortly before the end of the 18th century, agitators from the south of the boundary line came into Canada, they were looked after with care—and one of them, McLane, was in 1797 drawn, hanged and quartered at Quebec for endeavouring to stir up a rebellion against the King.

McLane's scheme involved an invasion by a large force from Vermont, well equipped with artillery, arms and ammunition. There can be no doubt that the government of the United States was quite innocent of any participation in the plan (it is indeed suggested that McLane was partially insane); but there is equally no doubt that the Vermonters wished to have the use of the St. Lawrence and had become discouraged by the attitude of the British Government in regard to the navigation laws.

From almost the very inauguration of the United States there was a party of considerable, though varying, strength which aimed at the absorption of Canada; and from the end of the 18th century, the administration in Canada lived in fear of an attack from the south. These fears were openly expressed in correspondence with the Home authorities; and at length, in 1812, the long anticipated war broke out. I do not intend to discuss the real origin and occasion of that war. Mr. Forster has done so recently at the Washington meeting of the American Society for the Judicial Settlement of International Disputes.

Washington was captured and in part burnt; but so were Newark, the previous, and York (Toronto), the then capital of Upper Canada.

I say nothing further as to the military operations and the success and conduct of the troops on either side—the Adjutant-General of the State of New York, General Verbeck of this city, has said something about that very recently. The war was wholly unnecessary, and the avowed were not the real objects. But that war came soon to an end—it never should have begun.

“*Inter arma silent leges,*” but, “*Armibus silentibus, lex proprium vigorem habet.*” And, accordingly, when the two branches of the race had satiated their taste for gore—for they would—and will—any time sooner fight than eat—law had its way. The Treaty of Ghent was entered into, which provided for a determination by arbitration of the matters still in dispute (Dec. 24th, 1814). The ostensible causes of the war were not so much as mentioned in the Treaty.

There is a bay on the Atlantic coast called the Bay of Passamaquoddy, in which are a few islands—of no great intrinsic value indeed, but then since Sancho Panza’s time an “Island” has had a sentimental value. (I find that in a solemn law report of a very famous case, in 1816, Upper Canada is called an “Island”—I presume, by way of compliment.) These islands in Passamaquoddy Bay were claimed as forming part of the United States, and by the other party as forming part of Nova Scotia. They were not large, but large enough to be a pretext for war, if either country really desired it.

The Treaty of Ghent provided that a Commissioner should be appointed by the King, another by the President, and that these should determine upon the claims. It was provided that if the Commissioners could not agree, the matter was to be referred to some friendly Sovereign or State. Fortunately, the Commissioners, Messrs. Holmes and Barclay, were able to agree: they gave Moose, Dudley and Frederick

Islands to the United States, and the remainder to Britain—and thus that little trouble was settled.

Commissioners were also appointed to determine the northern boundary of Maine: they did not agree: it was arranged in 1827 to refer this to a friendly Sovereign; and the King of the Netherlands was selected. He made an award in 1831 satisfactory to neither party. Both repudiated it, and the boundary was at length settled in 1842 by the Webster-Ashburton Treaty, or the Ashburton "Capitulation," as the sarcastic Palmerston called it. We Canadians have not quite got over the "Capitulation" yet, and we thank Lord Palmerston for that word.

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But Messrs. Porter and Barclay, the Commissioners appointed under another clause of the Treaty of Ghent to determine the boundary at the Lakes Ontario, Erie and Huron, were entirely successful in arriving at a satisfactory award: and this award given at Utica, June 18th, 1822, was received with universal approbation.

Consequently, this Treaty was successful in determining two out of three matters of controversy, either of which might easily have caused awkward complications.

Then there was another provision in the Treaty of Ghent which was destined to give trouble subsequently, and that was the article providing for the immediate delivery and restitution of all property taken by the forces of either party during the war. Some slaves had been allowed to get away upon the British war vessels, etc., and claim was made for their value.

By the law of England, when a slave's foot touches English ground, he becomes free.

"Slaves cannot breathe in England; if their lungs
Receive our air, that moment they are free;
They touch our country and their shackles fall."

The warship is by international law part of the coun-

try: and these slaves had therefore become free. England would not give them up, and could not in honour. In 1818 an agreement was made that the liability of Britain to pay should be determined by some friendly Sovereign or State. The matter was referred to the Emperor of Russia, and he made a compromise award; then in 1822 it was agreed that the amount to be paid should be determined by Commissioners appointed by the two governments. In the long run, however, a lump sum was agreed upon by the governments. This was paid, and so that source of trouble was stopped up.

About 1837, a greater or less number of Canadians conceived that they could not, by constitutional means, obtain relief from what was undoubtedly a wrong system of government—an irresponsible government—and in both Upper and Lower Canada rebellions broke out, only to be quickly suppressed. "Sympathizers" from Vermont made their appearance in Lower Canada, but met a speedy repulse. Mackenzie, the leader of the Rebellion in Upper Canada, effected his escape from the loyal troops, and established himself on Navy Island in the Niagara River. A few American sympathizers joined him there; but they did no great harm, and so far as I can learn, no good, for only the lawless remained with him. All along the international boundary "Hunters' Lodges" were organized with the purpose and design of invading Canada; and there was in 1838 a fiasco of an invasion by a small force which took possession of Napierville. They left for home with great celerity upon the approach of a British force.

About the same time an enthusiastic and thoroughly honest patriot, Von Schultz, a Polish refugee in the United States, headed a small body of men, who landed on Canadian soil near Prescott. He was cooped up by the Canadian Militia in the Stone Windmill still standing, and after suffering much loss, he capitulated with the remainder of his men.

After that awkward manner of theirs, of which I have already spoken, the Canadians put him on trial for his life at Kingston. He was defended by a young lawyer, afterwards the first Prime Minister of the Dominion, found guilty and executed with nine others: 136 were sentenced to death, but the number of 10 was considered sufficient *in terrorem*.

Then, at the other end of Upper Canada, a number of "Sympathizers," after they had killed a few Canadians, were caught by Colonel Prince. Some of them were summarily shot, and seven afterwards tried by the civil courts, found guilty of murder and executed. There never were any more "Sympathizers" in Canada, East or West. Placards were posted in Detroit, offering \$800 reward for the Colonel dead, and \$1,000 for him alive; but he kept safe on Canadian soil, and lived for long years thereafter.

A very satisfactory arbitration took place in 1854-55 under a treaty of 1853, in reference to claims made against either country by citizens of the other. Joshua Bates, an American who lived in London, was appointed Umpire by the two Commissioners, and he conducted the arbitration to the common satisfaction of all—except those who lost.

Ever since the organization of the Republic there had been trouble about trade matters, and in 1854 a treaty was entered into, the well-known "Reciprocity Treaty."

I cannot do much more than simply refer to this Treaty, so far as its commercial aspect is concerned. After it had been in force for some twelve years it was denounced by the United States. While it had defects and was not wholly satisfactory to either party, it was not these defects which caused its denunciation. The people of the United States thought—rightly or wrongly, I do not enquire—that Britain had been unfair in her dealings with the North during the Civil War; and the dislike engendered by this

feeling had its outcome in the international relations with Canada. It was thought that Canada should experience the resentment felt against her suzerain, and should suffer vicariously for her sins. And it was openly stated in Congress and elsewhere that Canada must be compelled to unite her destinies with those of the older and more populous nation to the south, under penalty of being cut off from the trade of the continent to which they both belonged.

And so the Treaty was denounced. Whether the pact now under consideration will ever come into effect or whether, if it should, it will be for the advantage of one people or the other, of neither or of both, I do not enquire. Such matters are "taboo" to His Majesty's Justice.

But this Treaty of 1854 provided that two Commissioners should be appointed with power to select, if necessary, a third by lot. These were to examine the coasts of British America and the United States, and determine the places reserved by the Convention of 1818, etc., for the British fishermen. I cannot say that the relations of the two nations in respect of the right to fish have ever been all that could be wished. Perhaps the award of 1910 may clear the air and make these relations more satisfactory and cordial in the future.

While all this was going on in the East, there was a little dispute in the far West. The Hudson's Bay Company and the Puget Sound Agricultural Company had, before 1846, become possessed of property, farms, etc., in the new territory at what was subsequently the North-Western part of the United States, but then a kind of No Man's Land, claimed indeed by Britain as well as the United States. When the nations in 1846 settled that the 49th parallel should be the international boundary, it was agreed that the possession rights of the Hudson's Bay Company and others in occupation of land or other property south of that parallel should be respected by the United

States—and further that any land or other property of the Puget Sound Agricultural Company taken by the United States should be paid for. As was not unnatural the parties could not agree, and, accordingly, in 1863 a Treaty was entered into for the appointment of Commissioners to determine the proper amount to be paid. Each Government was to select one Commissioner, they if necessary a third—or, if they could not agree upon the third man, the King of Italy was to select him. Some six years afterwards, in 1869, Messrs. Alexander S. Johnson and John Rose, the Commissioners, made their award, giving the Hudson's Bay Company \$450,000 and the Puget Sound Agricultural Company \$200,000 in full of all claims. It will, of course, be apparent that this Treaty and award did not affect Canada, as Canada was then constituted. The Dominion of Canada was not formed till 1867, i.e., after the Treaty: and British Columbia adjoining the North-West part of the United States did not form part of the Dominion till 1871, after the award.

So far all the Treaties were made without consultation with Canada. Canada was too young, it was thought, to be entrusted with the negotiation of bargains affecting herself. But in 1871 a change was made of great import to all concerned. For the first time, a Canadian was named one of the Commissioners to negotiate a treaty with the United States—Sir John Alexander Macdonald, K.C.B., Prime Minister of the Dominion. It is the firm conviction of many Canadians that up to this time the rights and interests of Canada never received due consideration—that the mother country was too anxious to have peace with her revolted and separated daughter to pay adequate attention to her who remained a member of the family.

* * * * *

But thereafter this cannot be said. No treaty has, since 1871, been made without the wishes and

claims of Canada receiving the most hearty consideration and support.

The Treaty of Washington, proclaimed 4th July, 1871, is one of the most important agreements ever made between two peoples.

In the first place, there were the claims arising out of the depredations upon American commerce during the civil war by the "Alabama" and other vessels allowed to escape from British ports. It was agreed that a Board of Arbitrators should be appointed, one by Britain, one by the United States and one each by the King of Italy, the Emperor of Brazil and the President of the Swiss Confederation—to meet at Geneva and decide "the Alabama claims" as they were called. That Board was appointed. It met at Geneva, and made an award in which Sir Alexander Cockburn, the British Commissioner, did not join—on the contrary he entered a most vigorous dissent. But Britain made no delay in paying the amount awarded.

Then there were the St. Alban's claim and the like arising from acts of Confederates who had been sheltered in or allowed to escape from Canada, and who did mischief in the Northern States. A Board of three Commissioners was to be appointed for these claims, one by each nation and one by them jointly, and if they could not agree the Spanish Minister at Washington was to appoint. That Board met at Washington and passed on some 500 claims, in most instances unanimously.

Another matter of arbitration arose out of the provisions of this Treaty itself in respect of the privileges given to the citizens of each country to fish in the waters of the other. A Board was to be appointed to investigate and pass upon this matter—one Commissioner by each contracting party and a third by the parties jointly, or, if they could not agree, by the Austrian Minister at the Court of St. James. This Board met at Halifax, and made an award which was

much in excess of the amount the American people had anticipated. For some time it looked as though the award would not be accepted by the United States; but better counsels prevailed, and the amount was at length paid.

There was also a question of boundary left unsettled. In the Treaty of 1846, the boundary line at the extreme West was thus described—"the middle of the channel which separates the Continent from Vancouver Island." This itself arose from a compromise. Up to 1818, Britain claimed the land in the west down to the Columbia River, which, at its mouth, was between 46 or 47 degrees N.L., while the United States claimed north to 54 degrees 40 minutes. In 1818, an arrangement was entered into by the two countries that all this territory should be open for ten years to settlement by citizens of either country. In 1824 and 1826, there were attempts to settle the boundary, but they failed—and one presidential election was fought on the cry: "Fifty-four forty or fight." At last, in 1846, a compromise offer was made by Great Britain that the line of 49 deg. should be taken to the ocean, and that the whole of Vancouver Island should be British. This was accepted; and the boundary was fixed and defined as I have already mentioned. When, however, Vancouver Island came to be explored there were found to be not one but three main channels between the Island and the mainland—De Haro next to Vancouver, Rosario next the mainland and Douglas between. Of course, Britain claimed that Rosario should be taken as "the channel"; the United States, De Haro. Between these lay San Juan and other islands, not worth much except as a source of irritation and as affording a possible pretext for war. An American commander, Harvey, occupied the island of San Juan with an armed force. British men-of-war were sent out, and war was perilously near. But common sense prevailed: negotiations resulted in the

joint occupation of the Island for the time being by British and American soldiers.

By the Treaty of Washington, the question was referred for determination to the Emperor of Germany: he decided in favour of the American claim, and you got the Islands. Then, in 1873, the whole boundary was finally settled (except on the Alaska side) by the Commissioners.

Canadians have a story that the compromise of 1846 was offered by Pakenham, the British Ambassador, because he had heard that the salmon in the Columbia River would not rise to a fly; and as a consequence that river, in his opinion, was quite valueless. The "few arpents of snow" which the French gave up without regret found their correlative in a river with salmon so destitute of spirit that they would not take a fly.

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Everyone must know of the trouble the seal fishing in the Pacific Ocean is still causing—the trouble was more acute twenty years ago. The United States claimed a sovereignty over the waters of the Pacific and the seal fisheries in that ocean, which Britain (and Canada) refused to acknowledge. Armed vessels were sent by the United States to patrol these waters, and some seizures were made of Canadian vessels. This is the stuff that wars are made of—and it must be recognized that had Britain been looking for war she had pretexts at hand which were more weighty than many upon which long and sanguinary wars have been waged. But the American commanders, far from their government, acted with prudence; and neither people was anxious for an armed struggle. A *modus vivendi* was arrived at: and subsequently a Board of Arbitrators was agreed upon to determine the matters in controversy. By this Treaty of 1892 each power was to name two Commissioners and the King of Sweden and Norway, the King of Italy and the President of France one each, making a Board of

seven in all. One of these was a Canadian Minister of the Crown, and Canadians took much of the burden of the reference. This was the Paris Commission, which awarded \$425,000 to be paid by the United States to the subjects of Britain.

The only part of the international boundary not settled was on the Alaska side. Canada claimed most of the long tongue to the south of the main part of Alaska and running along by the sea. Americans said, "What we have we will hold"—and negotiations came to an impasse. In 1903 it was agreed to refer the matter to a tribunal of six jurists of repute, three to be named by each Government. Two Canadians, three Americans, sat upon this tribunal, and the sixth was Lord Alverstone, Lord Chief Justice of England. This Board sat during the then ensuing summer in London, and gave a decision in which the Canadian members did not concur. But the majority award was accepted, and has been loyally submitted to.

In 1908 a Treaty of Arbitration was entered into at Washington by the United States and Great Britain after the failure of the previous Treaty of 1897 through the Senate refusing to approve. It provided that differences which might arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which could not be settled by diplomacy, should be referred to the permanent Court of Arbitration established at The Hague by the convention of July 29th, 1899, provided they did not affect the vital interests, the independence or the honour of the two contracting States, and did not concern the interests of third parties.

Article II provides that in each individual case the parties were to conclude a special agreement defining the matter in dispute, the scope of the powers of the arbitrators and the times to be set for the several stages of the procedure.

It was in conformity with the provisions of this

Treaty that the special agreement was entered into, with the concurrence of the governments of Canada and Newfoundland, for submission to The Hague Permanent Court of Arbitration of questions relating to fisheries of the North Atlantic Coast. The questions arose under the convention of 1818, which gave (Article I) certain rights to the inhabitants of the United States to fish in British waters. This special agreement, signed at Washington, January 27th, 1909, confirmed by interchange of notes March 4th, 1909, set out the matters in dispute, and the contentions of either party.

The Board appointed contained the Chief Justice of Canada and a Justice of United States Circuit Court of Appeals, as well as an Austrian, a Dutchman and an Argentine. Canadian counsel again took part in the presentation of the case of Great Britain, and assumed much of the burden of its preparation.

The result seems to have been satisfactory to both sides, as each claims a substantial victory. "O, si sic omnes."

"Peace hath her victories no less renowned than war"; and can anything be of grander significance than the fact that two nations who are among the most powerful that ever existed, whose whole history is full of deeds of valour on the tented field, who fear no foe and who feel a stain like a wound, have for more than a century found peaceful means for the settlement of disputes, sometimes of a grave nature, and the accommodation of misunderstandings not seldom acute? And questions of very varied character have thus been disposed of. The obligation to pay for runaway slaves and their value, the right to fish in certain waters, and the amount to be paid for fisheries where no such right exists, the value of lands taken by a Government from the citizens of another nation, the determination of River and Channel, the ownership of island and other territory—money, land, national boundary—all have been considered and suc-

cessfully considered. For while I do not at all say that I have made an accurate division of the various treaties, this, broadly, is the result: Of matters which were peculiarly pecuniary, there were five submitted—two arbitrations were wholly successful and three were not successful. Of matters which were not simply pecuniary, but involved territory or something of that kind, ten were submitted to commissioners—eight arbitrations were wholly successful and two not successful. There were four references to sovereigns, three of which were successful. Therefore, of the nineteen references, thirteen were wholly successful and only six have failed: and this I venture to say is an admirable showing.

How do we now stand? There are three main agreements, the Treaty of 1908 (of which I have already spoken), another of 1909 (the Waterways Treaty of much the same character), and the Rush-Bagot Convention of 1817.

The Waterways Treaty was signed January 11th, 1909; it provides for the establishment and maintenance of an International Joint Commission of the United States and Canada—three appointed by each government—which commission should (Article VIII) have jurisdiction over and pass upon all cases involving the use, obstruction or diversion of the waters between the United States and Canada. Article IX contains an agreement that all matters of difference between the countries involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other along the frontier, shall be referred to this commission for inquiry and report. Article X provides that any question or matter of difference involving the rights, obligations or interests of the United States or of Canada, either in relation to each other or to their respective inhabitants, may be referred for decision to this International Joint Commission. If the commission be equally divided an umpire is to be chosen in the man-

ner provided by Act 45 of The Hague convention of October 18th, 1907. This may be called a miniature Hague tribunal of our own, just for us English-speaking nations of the Continent of North America. And it goes further than the Treaty of 1908, as will be seen by reference to its provisions.

The Rush-Bagot arrangement arose in this way: during the war of 1812 some damage had been done and more annoyance caused by armed vessels upon the Great Lakes. The Treaty of Ghent did not provide that such armed forces should not be kept up; but it became apparent to both sides that it would be well strictly to limit the number and quality of armed vessels upon the fresh waters between the two countries. After some negotiation notes were interchanged, April 28th and 29th, 1817, containing the "Rush-Bagot convention," which notes contained an agreement by one and the other party limiting the naval force to be kept on the lakes to a very few: on Lake Ontario, one vessel; on the Upper Lakes, two vessels; on Lake Champlain, one vessel; none of the vessels to exceed one hundred tons burden, and each to have but one cannon of 18 pounds. It was agreed to dismantle forthwith all other armed vessels on the lakes, and that no other vessels of war should be there built or armed; six months' notice to be given by either party of desire of annulling the stipulation.

The arrangement was, after some delay, submitted by the President to the Senate, and that body in 1818 approved of and consented to it. I understand that constitutional lawyers in the United States—and all lawyers in the United States are constitutional lawyers—are not agreed as to the necessity for the President to lay this agreement before the Senate or for the Senate to approve of it.

It has been strictly observed, except where the consent of Canada has been obtained to trifling varia-

tions from its terms, variations more in the letter than in the spirit.

The understanding was, however, in great danger in 1864. The Minister of the United States in London was instructed in October of that year to give the six months' notice required to terminate the agreement; and Mr. Adams did so, with the subsequent approval of Congress. Before the lapse of the time specified, however, matters on the lakes had taken a different turn, and the United States expressed a desire that the arrangement should continue and be observed by both parties. This was acceded to, and ever since the convention has been considered in full force.

But there remains one thing more to mention. At a recent meeting of the American Society for the Judicial Settlement of International Disputes, the President of the United States gave utterance to an epoch-making statement—I have always thought that the President of the United States of America has the greatest power for good or ill of any man upon the face of the earth—and in this instance the President rose to the height even of his great opportunity. Mr. Taft said in substance: "There is no reason why every international question should not be submitted to judicial arbitrament, whether it be a question of money or of territory or of national honour." Mr. Taft has since that time, amid the harassing cares and multitudinous labours of his great office, continued to press on the adoption of arbitration methods. His efforts have been recognized and seconded by statesmen and churchmen in the mother country, and in Canada.

But few discordant notes are to be heard. Of course, the "fire-eater" is not dead, nor the pessimist, nor he who can walk only *per vias antiquas*, while the fool we have always with us. We hear that wars are necessary to keep down population, although the same argument is not advanced for famine. . . .

. . .—that war is needed to awaken and keep

alive valour and masculine virtues generally, although those who know most about war know best the absurdity of the argument: there is more valour in one day of attendance upon the sick in an epidemic than in a month of active warfare. I undertake to find ten men to face bullet or bayonet for every one who will face smallpox or malignant fever.* We are told that questions of national honour cannot be arbitrated, and that if any nation were to fire a shot at a peaceful ship of another, war must ensue, although Britain did not suffer in the eyes of the world or in her own, because she submitted to international arbitration when her peaceful fishermen were shot down on the Dogger Bank; that a man does not go to law when someone assaults his wife, as though that justified him in stealing the other's fish—or as though the circumstance that some outrage might be so gross that law would be forgotten, furnished an argument against law in general.

All these objections will, in the long run, fail: and the objectors will—must—suffer defeat. The brute, the tiger, must die, for what is war but a survival of the brute within? Whether man was evolving up from the lower animal or devolving down from a state little if any lower than the angels when he first made his appearance as man, I shall not discuss in the presence of learned theologians and accomplished scientists—we in Ontario are having our little troubles over questions of this kind, and I do not propose to get into hot water in New York State if I can avoid it. One way or the other, he was but little removed from the brute. He had the weapons of the brute, the tooth and claw—and he had adopted improved weapons, the club wielded by brawny arm, and the missile stone projected by strong and deft

* . . . ὥς τρις ἂν παρ' ἀσπίδα
σπῆναι θέλοιμ' ἂν μάλλον ἢ τεκεῖν ἄπαξ.

—Eurip. *Medea* ll. 250, 251.

hand. He was judge of what he would have, and of what he would not have: and wife and child and neighbour were kept in order by the tooth and claw, the club and stone. And then prevailed

. "the good old rule,
. the simple plan,
That they should take who have the power
And they should keep who can."

That is anarchy, the state that is spoken of in the good old book, "In those days there was no King in Israel, but every man did that which was right in his own eyes."

In affairs relating to the sept or clan, it was soon found that this would not do—that that sept or clan would die which allowed the rule of might alone to govern. A house divided against itself cannot stand.

Accordingly, public opinion began to have its effect. The tremendous power of public opinion in a primitive community no one who has not lived in or closely observed such a community can appreciate. Gradually it became a custom for disputes between individual and individual in the same clan or sept to be referred for decision to some independent tribunal—whether the chief who spoke "themistes" given by the god, or the priest also inspired by the god, or companion warrior. Such a tribunal, if temporary and for a special case only, is a board of arbitration; if permanent and for all cases, a Court—call it by what name you will. The more recourse was had to such tribunals and the less to club law, the more civilized the nation. All nations who can be called civilized have long grown out of the habit of allowing any man or body of men to assert and maintain by the strong hand what they conceive to be their right.

And this, although public opinion will permit a gross insult to be resented and physically punished on the spot.

Now man not far removed from the primitive state applied his club law to affairs international

as well as domestic—the rule was co-extensive with his relation to fellow-man—“fellow-human being” I mean. For woman did not escape the universal law; she suffered from the brutal whim of her savage mate. In some lands it is still laid down as a principle—

“A woman, a spaniel, a walnut tree,
The more you whip them, the better they be.”

The neighbouring nation like the neighbouring man had to be met with club and stone: and it was the God of Battles who was the God of the Nations.

It is a somewhat curious fact that it is in what relates to the nation that man is most conservative. Religion itself is made a department of national conservation—and every form of religious observance is carefully preserved in the ancient form. When the people at large have thrown away the stone knife and replaced it with one of bronze or iron, the priest cannot do the same: the time-honoured stone must still be used. Sacred things are not to be trifled with: and no revised version of any ceremonial or book of doctrine is to be tolerated.

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So in other matters affecting the State—the elaborate ceremony and formality is retained.

When men got over deciding private rights by club law within the nation, they could not take the logical step of doing away with club law in international disputes. For what is the battle-axe, the mace, the sword, but an improved club—the arrow, the Gatling bullet, but a form of missile, an improvement upon the stone?

I am often reminded of the little poem of Sam Walter Foss, so well known and so pat:

“One day through the primeval wood,
A calf walked home, as good calves should,
But made a trail all bent askew,
A crooked trail, as all calves do.

“Since then two hundred years have fled,
And, I infer, the calf is dead.
But still he left behind his trail,
And thereby hangs my moral tale.

“The trail was taken up next day
By a lone dog that passed that way;
And then a wise bell-wether sheep
Pursued the trail o’er vale and steep,
And drew the flock behind him, too,
As good bell-wethers always do.

“And from that day o’er hill and glade
Through those old woods a path was made:
And many men wound in and out,
And dodged and turned and bent about
And uttered words of righteous wrath
Because ’twas such a crooked path.

“But still they followed—do not laugh—
The first migrations of that calf,
And through this winding woodway stalked
Because he wobbled when he walked.

“This forest path became a lane,
That bent and turned, and turned again;
This crooked lane became a road,
Where many a poor horse with his load
Toiled on beneath the burning sun,
And travelled some three miles in one.
And thus a century and a half
They trod in the footsteps of that calf.

“The years passed on in swiftmess fleet;
The road became a village street;
And this, before they were aware,
A city’s crowded thoroughfare;
And soon the central street was this
Of a renowned metropolis;
And men two centuries and a half
Trod in the footsteps of that calf.

“Each day a hundred thousand rout
Followed the zigzag calf about;
And o’er his crooked journey went
The traffic of a continent.
A hundred thousand men were led
By one calf near three centuries dead;

They followed still his crooked way
And lost one hundred years a day—
For such reverence is lent
To well-established precedent.

“A moral lesson this might teach,
Were I ordained and called to preach:
For men are prone to go it blind
Along the calf paths of the mind,
And work away from sun to sun
To do what other men have done.

“They follow in the beaten track,
And in and out, and forth and back,
And still their devious course pursue,
To keep the path that others do.
But how the wise old wood gods laugh
Who saw the first primeval calf!
Many things this tale might teach,
But I am not ordained to preach.”

So it is—and the way of man with his fellow-man is alike conservative. And it may cost as much effort to turn men away from the old methods of international dealing as from the old ways of communication from place to place.

But of this be well assured. The city may continue to have her crooked streets, because they were crooked when her world was young: but the old manner of dealing of man with man must inevitably come to an end. For “Thus speaketh the Lord of hosts—show mercy and compassion every man to his brother.”

The splendid services to the cause of peace rendered by the late President of this nation are followed by the still more splendid services of Mr. Taft, enthusiastically supported as he is by statesmen of both sides of politics—and the people of the United States may well be proud that the first practical steps towards international peace throughout the world are made within and by their nation.

The Prince of Peace cometh—perhaps not to-day or to-morrow, but He must needs come—and “Blessed are the peacemakers: for they shall be called the children of God.”

THE GRADUATE AND THE PEOPLE.

Commencement Address,

BOSTON UNIVERSITY,

By THE HONOURABLE WILLIAM RENWICK RIDDELL,

L.H.D., F.R. HIST. SOC., Etc.,

Justice of the Supreme Court of Ontario.

TREMONT TEMPLE. BOSTON,

Wednesday, June the Third, Nineteen Hundred and Fourteen.

The Graduate and the People.

Commencement Address, Boston University,
Tremont Temple, Boston, Wednesday, June 3rd, 1914.

BY

THE HONOURABLE WILLIAM RENWICK RIDDELL,
L.H.D., F.R. HIST. SOC., Etc.
JUSTICE OF THE SUPREME COURT OF ONTARIO.

It is no small privilege which is given me this morning in being permitted to address you, young men and women of this University. For more than forty years connected more or less closely with Universities and University life, I am more and more convinced that the future of the nation and of the world depends, as it should depend, on the University—on the output of the University.

While it is not to be expected that even those who receive the benefits of the higher and the highest education will be wholly exempt from the failings and shortcomings of our common humanity, they must needs be trained to think and to discriminate, to differentiate the superficial and ephemeral from the essential and eternal.

It is with full consciousness of the manner of men and women I am addressing, that I speak: I may not carry you with me in all respects; but at least, in a University audience, careful thought must go before adjudication, reasoned judgment before condemnation as deliberate and well-grounded approbation before acceptance.

Civis Britannicus sum—Canadian to the finger tips—proud of the flag which floats over my northern home.

that flag which has braved a thousand years the battle and the breeze, I come to Boston as to the cradle of a movement which has done much to make my flag and my land what they are: Canada, a land to be desired and my British citizenship worth while. Not wholly as a stranger or a foreigner do I come, but as in some sense a kinsman—for your people and mine cannot be considered wholly alien from each other—yet I recognize that we are not of the same allegiance; and I can quite understand that it may sound strangely in the ear of an American for a non-American to speak as I have done, even if our language is the same and in great measure our descent.

It is not idle compliment but deep-felt, well-justified conviction which calls from a Canadian this tribute to your city—a sense of gratitude as well as of fellowship.

Our rugged forefathers in the infancy—or at least the childhood—of the race, met in their rude gatherings and decided the course to be pursued by sept or clan. This could not continue when the clan or sept became a nation, numerous and wide-spread; every man could not be present at a central point; the voice of every man could not be heard; only a few could be engaged in government. The experiment was tried of these few being selected by the King—the King's Council, by whatever name called—and the government of the people wholly guided by these, responsible to the one man who chose them.

That system lasted for many generations, and it is not even yet entirely effete among civilized nations. In most instances the adviser was either a priest or a noble, a man noble by birth or made noble by his Royal Master; and the ennobled and their descendants, with the higher orders of the priesthood, made a class, a preserve by itself, from which most servants of the Crown were chosen.

This could never be wholly satisfactory, and a system was adopted whereby the governed chose from among themselves representatives to express and assert their wishes, their needs, their aspirations. At first but those

who are called the upper classes were allowed to have any choice in the selection of representatives; but even then, many and bitter were the struggles between the one element, at least partially popular, and the other, a caste. The one grew more and more powerful until it could measure itself against not only the Noble class but even against the King himself; and personal rule seemed to meet its doom when the head of Charles Stuart fell at Whitehall.

But there was a recrudescence of personal and kingly rule; the class of people to choose representatives remained much the same and the representatives were subject to kingly influence, so that almost as much as before, the King ruled, though he ruled in form through these representatives—these in theory representing the people.

In the American colonies were many ardent lovers of freedom and self-government, who desired the substance as well as the form. In the Mother Country was a King who believed himself to have been specially chosen by Providence to govern; he thought that so long and so far as he could procure the majority of those who in theory were the representatives of the people, so long and so far was he entitled to govern all the people of the Realm. George III. was a sincerely pious and conscientious man; and there never was a grosser calumny than to charge the errors of his political conduct to defect in his moral character. He anxiously endeavoured to do his duty as he saw it; and his failure to govern the American Colonies wisely would have been the failure of almost any other who did not know America and Americans at first hand. His theory of government was that of most of the governing class in England at the time. Many of the American people refused to admit that persons chosen by a class in an island across the seas represented them, and insisted that they should be governed by and through representatives of their own choosing.

As under the Stuart the century before, while most objected to arbitrary measures, the people divided not

very unequally upon whether armed resistance should be resorted to or more peaceful and moderate means adopted—divided into Roundhead and Cavalier—so under the Guelph, while most Americans resented their treatment, they divided not very unequally upon armed resistance or constitutional opposition. The Revolutionists claimed the name of Patriots—their enemies called them Rebels; the other party were detestable Tories or United Empire Loyalists, according to the point of view.

Bitter things were said by each class of the other, some of them true. Revolutions are necessarily non-moral; rosewater neither creates nor quells great public movements, and neither elections nor battles are always won by prayer alone. Time has not wholly allayed the feeling of antagonism; but it is dying out, and I, though knowing that youth is always intolerant and believing with Plato that patriotism is necessarily cruel (and I add, unjust)—nevertheless I now venture to say to a young and patriotic audience that in essence and in the main both classes were much alike, and both alike were ardent and sincere lovers of their country. Descendants of Cavalier and Roundhead can do justice to the ancestors of the other; and Daughters of the Revolution and Daughters of the Empire, the Society of the Cincinnati and the United Empire Loyalist Association might unite in their celebration and agree that each should recognize virtue in the ancestor of the other. It may not be of evil omen that Boston University is to-day holding its Commencement on the birthday of King George V.

It is idle to speak of the stamp tax, the duty upon tea, an impost here, a restriction there, as being the cause of the American Revolution. These were but the tokens, the outward excrescences, which could not hide the essential and fundamental—the determination to govern themselves, inherent in all of the descent which the Patriots claimed. Kings they could abide, for who so loyal as they, so long as they could be loyal? An appointed Governor was not only tolerated but was even regarded with affection, so long as he did not attempt

to impose upon them the will of others; but that they should be in fact governed by themselves, whatever the form, they were determined.

Nor were they insensible to the importance of carrying with them their Northern neighbour; her, they desired as the fourteenth colony. Not long before, when Canada was French, the cry of the Bostonians was "Canada est delenda"—so said Governor Dummer. "Canada must be demolished—delenda est Carthago—or we are undone," cried Governor Livingston of New Jersey; and the pastor of the old South Church in Boston joined in the cry with statesmen throughout all New England. But now Canada become British was to be won, not destroyed; and every means was to be taken for that purpose. John Brown, the forerunner of another John Brown nearly a century later, and like him a hater of human servitude, ventured his life in a mission to Montreal. The Continental Congress addressed a letter to the Canadians; turgid as to our present-day taste it is, with its appeals to philosophy, it was in deadly earnest; the writers were little given to idle frivolity, and the times were already trying men's souls. When persuasion failed the sword was appealed to—the mad raid of Ethan Allen, the Argonautic expedition of Arnold, the campaign of Montgomery, which, with its early summer sunshine of success was overwhelmed with the black winter night of failure, disaster and death.

But without Canada, and in spite of her, the men of Boston and those of like mind, fought on to the triumph of their cause; for they could dream and not make dreams their master, could think and not make thoughts their aim.

You are proud of Boston and her past; and you do well. Your eyes fill with proud tears, your hearts with proud exultation when you think of Bunker Hill; and with justice. And I, a Canadian and a Briton, stand here and openly proclaim that I am as proud as you, as deeply grateful as you can be; for, as those embattled farmers stood in their stern array one hundred and forty

years ago, their ranks unwavering if uneven and owing little to the drill sergeant, filled with patriotic fervour, risking and willing to give all for freedom and self-government, they stood not only for themselves and succeeding generations of Americans, but for Canada and for every British Colony; nay (as has been said more than once) for England herself, for everything that makes England the England we know and all that makes the British Empire worth while.

The freedom they forcibly achieved for themselves, has been readily, cheerfully and ungrudgingly granted to the remaining colonies—the Commonwealth of Australia, the Dominion of New Zealand, the South African Union as well as the Dominion of Canada, are wholly self-governing, and free with a freedom which would have more than satisfied the heroes who fought on the field where Warren fell.

And the democracy fully established on this Continent reacted upon the mother country; and it is at least in part due to that reaction that now the common man has his say in the selection of those who will make laws for him. The House of Privilege, still standing in form, has been shorn of its power, it is no longer the final judge of what is right; and the King, once all-powerful, is glad to be relieved of the burden of government. The King now reigns but does not rule, while the President of the United States rules but does not reign.

The principles of freedom underlying the conception of government in the English-speaking peoples were not born in your Revolution. The Revolution was but the logical outcome of principles elaborated, declared and to a certain extent lived up to for centuries before; but the Revolution emblazoned them in letters of fire to be known and read of all men and never to be forgotten while the earth remaineth. The earth will sooner be shaken from her place and the pillars thereof sooner tremble than the fundamental right of a free man to choose his own governor fail of full fruition.

A Canadian thankfully acknowledging the leadership of this City in matters of civil freedom, may nevertheless

say with some pride that it was not Boston or Massachusetts which led in the cause of religious freedom, freedom to worship God in the form each man desired. The Pilgrim Fathers were not content to worship God in their own way, but they desired to make all others follow their method. It was the defect of the time. My own collateral ancestors on either side sealed their faith with their blood on the scaffold, but Riddell and Renwick would undoubtedly, had they had the power, been executioners and their judges the victims and they would have been perfectly confident that they were thereby doing God service and approving themselves good Christians.

We must come to Canada to find the first English-speaking country to allow complete freedom of religion. After the Reformation (I do not speak of Maryland, anomalous in many respects), Canada was the first to allow the Roman Catholic to take part in legislation and to be a freeman in every respect equal to the Protestant. And indeed it was one of the strongest charges levelled by the Continental Congress against the Imperial Government and King George that they tolerated a religion "bloody, idolatrous and hypocritical."

We have in most, if not in all, English-speaking communities got far away from the point of view of the Revolutionary fathers. We think Carroll of Carrollton just as good a patriot, as thorough a Republican as John Hancock or Samuel Adams.

But the proper course in matters pertaining to civil government may still be to discuss and to determine.

Here, then, is the true field of the University. "Let them obey who know not how to rule," said the proud Plantagenet; and he read well the signs of his times. Now, those who know not how to rule are not made slaves with no part in the Commonwealth except to serve and obey; they choose those who are to rule and in no small measure how they are to rule. We do not say "Jack is as good as his master," but it is because Jack knows no master. In the nature of things there must be leaders. It is said that during the evil days of the French Revolution a mob was hastening

past a house where sat, with a friend, one much in the public eye. "Where are they going?" said his friend. "I do not know, but I must go with them, for I am their leader," was the reply. Even in that crowd there were leaders, though perhaps not those ostensibly such—no movement is purely spontaneous. There always have been and there always will be—human nature remaining the same—men to whom their fellows look for light and guidance.

And where are they to be found? Not in the cloistered shade haunted by the recluse and the misanthrope.

Herodotus tells of the envoys sent to Delphi by the Dolonci to consult the Oracle. The Pythia said "The first man who offers you hospitality, take with you." Miltiades, son of Cypselus, sat by his door in the cool of the evening, and seeing them on the highway aweary, invited them into his house, and so became their King. Axylus sung by Homer who lived by the side of the road was the friend to man, for he loved all—

(Πάντας γὰρ φιλέεσκεν, ὁδῶ ἔπι οἰκία ναίων.)

Diomedes, the mighty master of the warcry, slew him, but he was not a failure, his name and fame are eternal, embalmed in deathless verse.

"There are hermit souls that live withdrawn
In the place of their self content;
There are souls like stars that dwell apart
In a fellowless firmament";

and they often are the very elect; but they must be few in number.

He who shuns his fellows, may have a high mission, a lofty outlook, and he may be worthy of all praise. But there must be some to mingle with the people, to know their needs at first hand, to take an immediate and not simply a mediate part in directing their thoughts and their aspirations. Those who do that, there must always be, whether worthy or unworthy, whether for good or for ill.

Is that function to be left to the ward heeler, to the boss who makes his living by it, to the party hack with no thought above the immediate success of some scheme? It is not unusual in your land, as it is not unusual in mine, to speak contemptuously of the politician, as though it were a degradation to take part in the government of the country; a disgrace to put into practice that for which your forefathers fought and died. A Washington, a Jefferson, an Adams, a Lincoln—these may receive commendation, for they were statesmen. He was wise who first said that the difference between a politician and a statesman is that the statesman is dead.

Some one must lead; who is it to be? “Freely ye have, freely give.” The inestimable gift of civil freedom, the highest privilege an honourable man may enjoy is yours as a birthright.

“We must be free or die who speak the tongue
That Shakspeare spoke, the faith and morals hold
Which Milton held.”

You have been educated in an institution where thought is free as the air you breathe, you have been trained to think, your whole education has been to cast off from your minds and souls the trammels of ignorance, of superstition and of cant, the example of the great and good of all ages has been ever held before your eyes and you have been taught to fear God and to eschew evil.

Noblesse oblige; and as “with the same measure that ye mete withal it shall be measured to you again,” so with the same measure with which it has been measured to you, with that measure, mete ye.

This University was not founded simply to give information to intending ministers or doctors or lawyers or engineers. Those who bore the burden and heat of the day when Boston University was but a young and struggling institution did not have in view simply learned savants, acute theologians, skilful surgeons, astute and subtle lawyers. These indeed they hoped for and expected; but their desire was for men and women who

should indeed know their rights, and knowing dare maintain, but who should also their duty know. Brilliant graduates, graduates of compelling ability who should make their Alma Mater famous in their own fame, their faith gave them to foresee, and they have not been disappointed; but most they wished graduates who should recognize their duty to their God, to the world, to their country and their fellow-countrymen.

And it should be the glory of a University that from its walls go forth the leaders of the people. If the blind lead the blind, both shall fall into the ditch; it is the function of a University to supply those who can see, who both can and will prevent their countrymen from falling into the ditches that are all too common, ditches of ignorance, ditches of prejudice, ditches of class hatred, ditches of international ill-will, ditches which lead to national discord or it may be to bloody devastating war. "He loved his fellow men" is the greatest praise which an honourable man should covet, if that love has been made manifest in deed and not in empty rhetoric. If love of fellow men be not the effect of University study and training, better that the University should cease to exist. It is for the public service, the public good, that public support is given to such institutions of learning, and the public should in common honesty receive the reward which is due.

The neighbouring college which trained a Garfield, the venerable and historic elder sister across the way which gave this land a Roosevelt, and that of another State which produced a Taft, or another a Wilson, did not crush in their minds the desire for public service. It may be that the true place in history of some of these is not certain, but that the United States and the world are the better for their having lived, few will gainsay—big men, true men, tried men filled with a common patriotism for a common country.

All the problems of government have not been solved; many remain calling for the clearest thinking, the renunciation of prejudice, honest and sincere determination to do the thing that is right. "Because right is right,

to follow right," is "wisdom in the scorn of consequence."

As an outsider, I can see many such—the conflict between labour and capital (or rather between some who are thought to represent labour and capital), the old but ever new question of the tariff, for no tariff can be permanent, at least not without constant defence against constant attack; the problem of the black race and their uplift, upon the solution of which almost certainly will depend the prosperity of the Southern States and perhaps that of the Northern States as well; prohibition and whether it prohibits or when the evil spirit of intemperance is thought to be driven out for good, has he not simply gone and taken with him seven other spirits more wicked than himself, and have they not entered into the house empty, swept and garnished and dwelt there, so that the last state is worse than the first? Are noble, thoroughly educated women to have a voice in what this country is to do, or must they pay the traditional penalty, bear the traditional disability of their sex? An American woman, a graduate of Boston University, perhaps with property and certainly with brains—is she to see the navvy, descended from long generations of serfs and himself a newcomer on this continent, understanding our language but little, our institutions still less, casting his ballot, while she must stand helpless by, because God made her a woman? The specious talk about women being represented by their fathers, husbands, brothers or sons reminds one of the contention a hundred years ago that the American colonists were virtually represented in the House of Parliament; this met its well-deserved doom at the mouth of the cannon, the edge of the sword; is the other, still heard even in the cradle of the Revolution, more in accord with reason and justice? In the present system in some lands the woman can exercise an influence only as did the slave in the Roman times and later—coax, but not persuade; wheedle, but not argue; talk, but not act. I do not say that this is wrong—many of the grandest women the world ever saw think it is

right. The question must be settled not by prejudice or appeals to old-established rules and customs, but by reason, by arguments based upon justice and eternal right. Whatever be the view one may entertain, he should support it by reasoning which appeals to the intelligence—and to that kind of reasoning women are as responsive as men, for they are to at least as great an extent as men intelligent beings. They who settle—and settle right—this are as deserving as the Fathers who settled right the question of the government of the thirteen colonies—and it will not down until it is settled and settled right.

Not long ago, I asked the students of another American University to answer for themselves certain questions. (I have no opinion on these and have no right to express it if I had, for I am not an American citizen): "Is the Democrat a traitor to business prosperity? And is the Republican a traitor to the consumer? Is the Progressive a wild-eyed, impossible enthusiast? Is the Standpatter tied hand and foot to 'the interests'? Is the President of the United States a receiver of stolen goods and Wilson the nominee of the Trusts? Is Colonel Roosevelt a self-seeking demagogue who would break up a historic party for his own selfish ambition? Is the Bull Moose nothing but a big overgrown bully who thinks of nothing but himself and cannot keep away from the light however fatal that may be, or is he a noble creature, king of forest and plain, splendidly showing the way for the weaker to follow?" Some of these questions may have been answered or may have answered themselves since they were first asked nineteen months ago; but the like grave and important questions are still pending, and must in the nature of things arise from time to time. They must be answered in some way in fact and in deed, if not in word. Where are the men and women who will show how they should be answered? They should be *here*; and it was not he who hid his talent in a napkin that received the Master's word "Well done, good and faithful servant."

I have said nothing of religion. I know that this University is a Christian University, that religion is of

its very essence; that non-sectarian as it is, it does not look with indifference and unconcern upon the spiritual state of its students. Nevertheless, I have thought it well not to cite the teachings of our holy religion, but to address you purely from a secular standpoint. If, indeed, pure religion and undefiled were the mistress of thought and action, nothing I have said needed saying.

All the national questions which have been suggested, important as they are, pale almost into insignificance compared with the greater question which has tortured the world from times primeval. Our intra-national questions we can settle by the ballot, disputes between man and man we can settle by the Courts or by arbitration; how are we to settle international questions, disputes between nation and nation? Nature, red in tooth and claw, shrieks loudly "the survival of the fittest"—not the best and noblest, but the strongest, the best fitted to the environment. In a very real sense "the whole creation groaneth and travaileth in pain." If nature were the last word of God as she is the first, we must needs bow; *sic volo, sic jubeo, stat pro ratione voluntas*; but the natural man, the carnal mind is enmity against God; the moral and ultimate governor cannot be as the brute creation; He must be as our highest thought demands.

Nothing can be good in Him
Which evil is in me,

and blood and agony and death cannot be the final argument. Might never yet made right.

The savage, unbridled by reason and justice, vindicates his right by his own strong arm. Too often the savage remains imbedded in the nation, and what it wishes it takes. It is the glory of modern civilization that all questions between individuals shall be settled by an impartial tribunal on rules based upon the eternal principles of justice and right. No personal pride or sense of personal honour justifies an individual withdrawing himself from the jurisdiction of that tribunal. How do we settle questions between peoples? and do we not sometimes think and say that national pride, national

honour demands force and justifies withdrawal of the national cause from all international adjudication?

I am not a peace-at-any-price man; war in my view is unhappily sometimes not only a right but even a duty. A standing army and a navy constitute, in the existing state of humanity, a safeguard like a police force. In the general case, however, of international disputes, war can no more be necessary than it is necessary for two persons who have a dispute to fight it out with lance or club as was the custom centuries ago in England.

Your country and mine a hundred years ago were at war—a war against which this State, the mother of heroes, protested and voted as long as she could, a war which came near to rending the Union in twain, a war which retarded the development of my Province more than a quarter of a century. I do not mean to go into the causes of that war; some of them may yet be obscure, and the whole story may not yet have been told. Neither shall I dwell upon the indirect results of the war, costly, bloody as it was. Just about a century ago, American soldiers were burning the Capital of Upper Canada and destroying the Parliament Buildings and Public Library there, kicking the volumes along the streets of York; British soldiers were destroying the Capitol at Washington. Goth and Vandal were not much worse, and yet it was the logic of war. Both peoples got tired of the fratricidal struggle and both agreed to leave off as they had begun. The war settled nothing; each set of negotiators thought they had secured—and they had secured—a triumph when they got the other side to refrain from insisting upon stipulations which would modify the *status quo ante bellum*.

We have four thousand miles of international boundary without a soldier or a fortification; we have thousands of square miles of international waters for nearly a hundred years unpolluted by the keel of a ship of war. During that hundred years there have never been difficulties so great—and there have been great difficulties—never controversies so acute—and there have been acute controversies — never misunderstandings, charges of

wrong and recriminations, heart burnings and bitter resentment so overpowering, and all these there have been and too often, that it was necessary for brother to raise up his hand against brother and dye his hand in a brother's blood.

Leaving aside the settlement of the boundary at the St. Croix River, and the mutual claims of American and Briton settled under Jay's Treaty of 1794, for these were before the War, we have since that war by peaceful means, means at least analogous to a Court, settled the boundary at Passamaquoddy Bay, along the Great Lakes and International Rivers, at Vancouver Island, at Alaska, the obligation to pay for runaway slaves taking refuge under the folds of the Union Jack and refusing to return to the land of the free and the home of the brave, for they knew that in all the broad land there was no place where they might be free, none where for them to be brave was not torture and ignominious death; the right of American fishermen to take cod, of Canadian sealers to take seal, what the United States should pay for land belonging to British subjects, for fish taken in British waters, what Britain should pay for American ships wrongly taken, and for her defective municipal laws allowing the escape of a Confederate cruiser. All these and more by arbitration; diplomacy settled the north-eastern boundary, after arbitration failed, and the boundary from the Lakes to the Pacific after threat of war (though "Fifty-four forty or fight" may have only been an election cry).

Loud cries of injured national honour, of infringement of national territory, were heard on either side of the line; but the plain common-sense, the Christian sentiment of the mass of the peoples stilled the cry of the jingo, and war was not.

The example of two such nations as these might well be followed by others, and in good time it must and will be followed. No doubt the watchman on the tower will often hear the anxious question, "Watchman, what of the night?" before, looking eastward he can say, "The morning cometh," without adding "and also the

night." But that answer will be made. Weary hearts looking for world peace will again and again be saddened by wars and rumours of wars; but these must cease at length. Christ died upon the tree to save mankind, and nineteen centuries after his sacrifice but the fringe of heathendom has heard the good news; yet his kingdom is secure, his throne as the days of Heaven.

Even if there is not to be a world peace, there may at least be peace so far as your great nation is concerned. The United States does not need to show its power, its glory is gained and is imperishable, it can be diminished only by the United States itself; the altruism exhibited in the case of Cuba, the ardent love of peace exhibited in bringing about the Conference and Treaty of Portsmouth, the self-restraint when goaded by petty shafts of malice launched by the mischief-seeking and injuries brought about by those desiring war, all are to its credit.

Are the graduates of Boston University to aid in maintaining the high standard set by their country, are they to seek peace and ensue it? If so, they must receive the blessing pronounced on the Mount upon the peacemakers.

This is not always easy; the poetry, the glamour, the romance of war is part of our common inheritance. We are fighting animals by instinct, our literature is full of battle, and the successful general becomes the President or the popular hero. Peace is tame and prosaic, it appeals not to the eye or ear, and it needs a strong heart to treasure it despite the blare of trumpets and flash of swords.

And yet it must triumph or all moral governance of the Universe is impossible. Far, far back the Hebrew prophet saw what must come to pass, unless there is nothing but blind chance. "The government shall be upon His shoulder, and His name shall be called Wonderful . . . The Prince of Peace. Of the increase of His government and peace there shall be no end . . . The zeal of the Lord of Hosts will perform this."

Do you believe it, and will you do your share?

REPORT
OF THE
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LAKE MOHONK CONFERENCE
ON
INTERNATIONAL ARBITRATION
MAY 15th, 16th AND 17th
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can still negotiate special treaties to cover questions such as these, proper for arbitration but which are excluded from arbitration by the Bacon amendment. So we can now, without the general arbitration treaty. So we could and did last year with Mexico. But wherein will it be easier to arrange such special arbitrations after we have gone on record by excluding such questions from the terms of our general arbitration treaties and thereby giving *prima facie* notice, at least, to foreign nations, that we no longer propose to arbitrate them?

Finally, we have the exception "concerning the question of the alleged indebtedness or monied obligation of any State of the United States." Here we have an exception which is altogether aimed at the exclusion of justiciable questions. As Senator Lodge remarked, in discussing the matter, "if a pecuniary claim is not justiciable I do not know what is." For historical reasons, however, which seem sufficient to many people in this country, we do not think it advisable to arbitrate the question of the validity of the Southern bonds of reconstruction days, and, of course, it was this particular class of indebtedness which was aimed at by this amendment. But this question of the reconstruction bonds had already been taken care of by the language of the first article of the treaty, which provided only for the submission of differences "hereafter arising," thus, by language at once general and inoffensive, which in no wise interferes with the logic of the treaties, meeting the insuperable practical objection to the submission of questions growing out of the reconstruction bonds to arbitration.

The Bacon amendment, however, excludes not merely questions arising out of the transactions of reconstruction days, but all questions, at any time arising, with respect to the indebtedness of any State of the United States, thus not merely preventing the reopening of certain very unhappy transactions in the past but amounting to a general repudiation on our part, in advance, of any possibility of the application of judicial methods to the settlement of such questions in the future; and this although the United States was not only a signatory but was the proposer and chief advocate of the Hague Convention respecting the limitation of the employment of force for the recovery of contract debts which aims at securing the submission to arbitration of questions growing out of the failure of the signatory countries to meet their public debt, as well as other questions of contract indebtedness. It is believed that this feature of the Senate amendment is at once unnecessary, illogical and susceptible of giving offence to foreign governments.

In conclusion, it is submitted that this amendment has destroyed the symmetry of the arbitration treaties, has done away with their logical quality, has vitiated the fundamental princi-

ples upon which they rested so that they are no longer in fact treaties of general arbitration, and, furthermore, that certain provisions of the amendment are quite likely to irritate foreign nations with whom it is most important for us to negotiate treaties of general arbitration.

It is believed that the arbitration treaties with Great Britain and France, as originally drawn and as construed in the Lodge amendment, were bold and statesmanlike documents, a genuine advance over all that had been done before. Whatever disposition may ultimately be made of the treaties a great part of their mission has been accomplished. "There never was one lost good." In the education which the country at large has received and the better understanding of the great and intricate subject which has come to the Senate itself, through the discussion which has taken place in and out of Congress and the inspiration which has come to the friends of peace in all lands through the negotiation of these treaties and the struggle for their adoption, lies a great gain which the ultimate fate of the treaties, whatever it is, can never destroy.

But, returning to the fundamental thesis suggested in the beginning of these remarks, that the value of these treaties lies in their usefulness as models and in their inspirational power as respects future treaties, and not in their practical utility in preventing war between the contracting parties, it is submitted that to ratify the treaties as amended would, on the whole, hinder rather than help the cause of peace through justice. (Applause.)

THE CHAIRMAN: It illustrates, I think in a measure, our lack of the international mind, of which I ventured to speak yesterday, that a brief sentence in Mr. Dennis' very interesting address, made an announcement which perhaps passed unnoticed but which is of very great international importance and to which, to the best of my knowledge, no newspaper in the United States has yet referred, although it took place some three weeks ago.

You remember, perhaps, the state of the negotiations in regard to the establishment of a prize court and the negotiations which have been carried on in regard to the Declaration of London, the action of the British government in the House of Commons in support of that declaration and the rejection of it by the House of Lords. Our own action in regard to that declaration has been pending before the Senate for a year and a half.

About three weeks ago, on the initiative of Senator Root, whose instinct for statesmanship is a ruling passion, we ratified the Declaration of London and the Prize Court Convention; in other words, we have assented to the establishment of a permanent tribunal and the law to govern it in prize court cases. So far as I know, until Mr. Dennis referred to it, no public statement in regard to it has been made to the American people.

I have pleasure in presenting as the next speaker Honorable Justice WILLIAM RENWICK RIDDELL, of the Kings Bench Division of the High Court of Justice for Ontario.

ARBITRATION TREATIES AFFECTING THE UNITED STATES AND CANADA

ADDRESS OF HON. WILLIAM RENWICK RIDDELL, L. H. D.

As a Canadian, and speaking on behalf of my Canadian brethren, I want to begin by saying we feel it is a good thing for us to be here! For not only do we participate, I hope, in the general humanitarian feelings of the age, but we have a peculiar reason for believing in international arbitration; because we know that just as in that wretched, unfortunate, wicked war which began just one hundred years ago Canada was the part of the British Empire which suffered most, so in any future war between this nation and the British nation Canada must necessarily be again the suffering part of the British Empire. So it is plain that we have a very peculiar reason for believing in international arbitration.

The geographical relation between the United States and Canada (and I use the word "Canada" in the geographical, not the historical sense) permits, and indeed compels, these two countries to be an example to the rest of the world. They have the largest international boundary in the world; they also have vast realms which have not changed allegiance for a long period of time and which have had no dislocation in form of government, etc.

No doubt the other conditions have been eminently promising for testing under most favorable terms the working of international treaties of arbitration. Those responsible for the policy on each side of the boundary were descended in great measure from the same stock, they had hundreds of years of history in common, the same language and laws, the same religion and manners, and in substance the same institutions, social and political. What is called for want of a better word the "genius" of the peoples was and is the same.

Until 1871 it may be said in general terms that the treaties were negotiated on the British side by statesmen in the Mother Country. These were indeed aided and instructed (so far as they would accept aid and instruction from "colonists") by Canadians, Nova Scotians, etc., but they were not responsible to the people on the north side of the international boundary; their responsibility was to the people of the British Isles.

From and after 1871 it may be said—again in general terms—that the British side of the negotiations, so far as they affect Canada, has been conducted in fact, if not in form, by those re-

sponsible to Canadians, and the treaties have in that regard been in fact Canadian treaties. An interesting comparison might be drawn between the treaties before and those after 1871, but this is not the place for it.

The long story begins with Jay's treaty of 1794, which provided for three commissioners (one appointed by the King, one by the President and the third chosen by these two, or if they could not agree, each was to name one and one of these chosen by lot) to determine the Northeast boundary of the United States. This failed, and it was not until 1842 that the matter in dispute was settled. Jay's treaty also provided for the determination of the amount the United States should pay to British creditors on certain claims. The commissioners for this purpose were five in number, two appointed by the King, two by the President and the fifth by the unanimous voice of these four, or by lot. This also failed; and in 1802 a lump sum, £600,000, was agreed upon.

Britain was also to compensate certain American creditors; a board of five commissioners was appointed in the same way—their labors were interrupted for a time by difficulties arising from the claims of the British creditors, but in 1802 it was agreed that they should resume their duties—and ultimately they were successful.

The War of 1812 was followed by the Treaty of Ghent, 1814. This provided for two commissioners to fix the boundary line at Passamaquoddy Bay, one appointed by the King, one by the President of the United States. These gentlemen, Messrs Holmes and Barclay, arbitrated—they proceeded judiciously indeed but not judicially—"it became necessary that each of the commissioners should yield a part of his individual opinion"—and they made an award in 1817 satisfactory to both sides. By the same treaty (that of 1814) two commissioners appointed in the same way were to determine the Northeastern boundary, but they failed to agree.

The boundary at the Lakes Ontario and Erie, etc., was satisfactorily settled by the commissioners, Messrs. Porter and Barclay, who made their award at Utica in 1822.

In 1818 a convention was concluded dealing *inter alia* with the question of the liability of Britain for the value of slaves. That was to be determined by some friendly sovereign of state, and it was referred to the Emperor of Russia. The value was to be determined by a board of commissioners. Ultimately, however, a lump sum was accepted by the United States. These proceedings did not affect Canada, but I insert a reference to them here as of interest and for the sake of completeness.

In 1827 the determination of the Northeast boundary was agreed to be left to some friendly sovereign or state. The King of the Netherlands was chosen the following year, but his award

made in 1831 was satisfactory to neither party, and the line was finally settled by negotiation resulting in the Ashburton Treaty (or "Ashburton Capitulation," as Lord Palmerston called it) in 1842.

A convention in 1853 provided for claims by American citizens against Britain, and by English subjects against the United States, being passed upon by two commissioners who were to name an arbitrator or umpire, and if they could not agree, each to name an arbitrator or umpire and a lot to be cast which should act. An American and an Englishman being appointed as commissioners, they appointed an American living in England, Mr. Joshua Bates, umpire, and this board were completely successful in satisfying everybody except (and in some cases not even except) those who lost. In this, Canada was not specially interested.

In 1854 it was agreed that the places at which United States fishermen might exercise the rights conferred by the Convention of 1818, of taking, curing and drying fish, were to be determined by two commissioners and an arbitrator appointed in the time-honored way.

On the other side of the continent there were also difficulties. Britain had claimed down to the mouth of the Columbia River between 46° and 47° , the United States up to $54^{\circ} 40'$. By the treaty of 1818 it had been arranged that the debatable land should for ten years be open to "citizens and subjects of the two Powers" without prejudice to the claim of either. After abortive attempts to settle the matter in 1824 and 1826, the time was extended indefinitely in 1827. Polk's election was fought and won on the cry "Fifty-four forty, or fight" (no one ever heard of an arbitration treaty winning an election), and finally a line at 49° was agreed upon in 1846, the United States to respect the possessory rights of Hudson's Bay Company and others south of the line and pay for any land taken by the government.

In 1863 a treaty was entered into whereby the claims of the Hudson Bay Company and the Puget's Sound Agricultural Company were referred to a board of commissioners—one to be appointed by each government, one arbitrator or umpire to be appointed by them, or if they could not agree, by the King of Italy. The commissioners, Messrs. Rose and Johnson, made their award in 1869.

In 1871 the Treaty of Washington was made, containing provisions for arbitration of no less than four separate matters:

1. The "Alabama claims" to be disposed of by five arbitrators—one appointed by each of the following persons: the President, the Queen, the King of Italy, the President of the Swiss Republic and the Emperor of Brazil—the King of Sweden to act if any of the last-named three declined to appoint. These

arbitrators met at Geneva and made an award in which the British representative, Sir Alexander Cockburn, refused to join. It was, however, loyally accepted by Britain. This did not specially affect Canada.

2. Other claims against Britain, e. g., for the St. Alban's Raid, etc., to be dealt with by three commissioners, one appointed by each government and a third by the two governments conjointly, or if they could not agree, by the Spanish Representative at Washington. These met at Washington and passed on a great number of claims.

3. Claims by Canada arising from the fact that the American fishermen had gone beyond the rights to fish, etc., given by previous treaties. These were to be disposed of by three commissioners, one appointed by each of the two governments, the third by the two governments jointly, or if they could not agree, by the Austrian Ambassador at the Court of St. James. These met at Halifax and made their award. The United States demurred for some time to paying the amount awarded, and it began to look as though the submission would be repudiated. After a time, however, better counsels prevailed, and the amount was paid.

4. What was the middle of the channel which separated the continent from Vancouver Island, which the treaty of 1846 had laid down as the boundary line in the Far West? Commissioners had been appointed (not by treaty but by diplomatic action) to fix this channel, but had failed. There were three channels—De Haro, Douglas and Rosario—separated by islands; and it was agreed to refer it to the Emperor of Germany to determine which was the channel meant in the treaty of 1846. He in 1872 decided for the De Haro channel; and the United States added so much to her territory.

Beginning about the early 80's, there was trouble about Canadian sealers in Bering Sea, and the adjoining ocean. Sixteen Canadian vessels were seized by American revenue cutters. At length, in February, 1892, the whole question as to damages, if any, to be awarded was agreed to be referred to seven arbitrators—two to be named by each government and one each by the King of Italy, the King of Sweden and Norway and the President of France. These in 1893 met at Paris and made an award of \$425,000 to be paid by the United States. It was paid shortly after.

Then came the Alaska Boundary Treaty. The surveyors appointed under a convention made in 1892 had failed to agree—the question was not one of science—and in 1903 it was agreed to refer the matter to a board of six impartial jurists of repute. They met in London in 1903, and, the two Canadians dissenting, made an award which excited much unfavorable comment in

Canada, but which has been submitted to without formal objection.

In 1908 a general treaty of arbitration was entered into by Great Britain and the United States which provided for the reference to the Court of Arbitration at the Hague of differences of a legal nature or relating to the interpretation of treaties; but in each case there was to be a special agreement defining the powers of the arbitrators, etc. A special agreement was made in 1909 as to the right to fish, etc., of American fishermen off the North Atlantic coast, which matter came before a board sitting at The Hague in 1910 and composed of five persons, the Chief Justice of the Supreme Court of Canada, a distinguished American Judge, an Austrian, a Dutchman and an Argentine. Their award was a victory for both parties *illis judicibus*.

Then there is a treaty made in 1909 specially for the United States and Canada, providing for an international commission of six—three appointed by the United States and three by Canada—to pass (with the consent of the two countries) upon all disputes involving the rights, obligations or interests of the United States or Canada either in relation to each other or to their respective inhabitants. This I have on another occasion called a miniature Hague tribunal just for us English-speaking nations of the North American continent.

I do not propose to speak of abortive treaties which failed of confirmation by the Senate—the defeat of these may not be the proudest boast of the Senate in the future—I cannot judge—that is for history.

It will not, perhaps, be wholly useless to put the result of our inquiries into a tabulated form. The following does not claim scientific accuracy, but is a somewhat rough tabulation. I have brought in a treaty of 1822, etc., that the list may be more full. The lists below will include all the arbitration treaties between the United States on the one hand and Great Britain on the other.

Arbitration Treaties have been made covering the following matters:

- No. 1—1794. The N. E. boundary, St. Croix River.
 2—1794. Claims against Britain by Americans.
 3—1794. Claims against the U. S. by British.
 4—1814. Boundary at Passamaquoddy.
 5—1814. Boundary at Lakes, etc.
 6—1814. N. E. boundary again.
 7—1818. Liability of Britain to pay for slaves.
 8—1822. Value of slaves.
 9—1827. N. E. boundary.
 10—1853. Claims by citizens of each country against the other.
 11—1854. Places on N. Atlantic coast where Americans might fish.
 12—1863. Claims by Hudson Bay Co., etc.
 13—1871. "Alabama" Claims.
 14—1871. "St. Alban's" Claims.

- 15—1871. Payment for fishing.
- 16—1871. Vancouver channel boundary.
- 17—1892. Seal Fishery Claims.
- 18—1903. Alaska Boundary.
- 19—1909. American Fishing Rights, in St. Lawrence, etc.

A ROUGH CLASSIFICATION OF SUBJECTS.

(1) *Determination of Boundary.*

a. By Sovereign of Foreign State.

- No. 9—1827. N. E. Boundary. (Failed.)
King of Netherlands.
- 16—1871. Vancouver Channel. (Successful.)
Emperor of Germany.

b. By Commissioners or Arbitrators.

- 1—1794. St. Croix River. (Failed.)
- 4—1814. Passamaquoddy Bay. (Successful.)
- 6—1814. N. E. Boundary. (Failed.)
- 5—1814. Boundary at Lakes, etc. (Successful.)
- 18—1903. Alaska Boundary. (Successful.)

(2) *National Rights, etc.*

a. By Sovereign of Foreign Power.

- 7—1818. Liability to pay for slaves. (Successful.)
Emperor of Russia.

b. By Commissioners or Arbitrators, etc.

- 11—1854. Places where Americans may fish. (Successful.)
- 17—1892. Right to seize Canadian Sealers. (Successful.)
- 19—1909. American Fishermen in Gulf of St. Lawrence, etc. (Successful.)

(3) *Claims Mainly Pecuniary, Involving Sometimes Other Considerations.*

b. By Commissioners or Arbitrators, etc.

- 2—1794. Claims against Britain by Americans. (Successful.)
- 3—1794. Claims against U. S. A. by British. (Failed.)
- 8—1822. Value of Slaves. (Failed.)
- 10—1853. Claims by each against other. (Successful.)
- 12—1863. Claims by Hudson B. Co., etc. (Successful.)
- 13—1871. "Alabama" Claims. (Successful.)
- 14—1871. "St. Alban's" Claims. (Successful.)
- 15—1871. Fishery Claims (Halifax). (Successful.)

FORM OF TRIBUNAL.

(1) *Foreign Sovereign.*

- 7—1818. Emperor of Russia. (Successful.)
- 9—1827. King of Netherlands. (Failed.)
- 16—1871. Emperor of Germany. (Successful.)

(2) *Commissioners, Arbitrators, etc.*

- a. Three Commissioners. One Appointed by Each Power, the Third by These Two, or in Case They Cannot Agree, by Lot.

- No. 1—1794. St. Croix River. (Failed.)
- 8—1822. Value of slaves. (Failed.)

In part.

10—1853. Claims against Britain or U. S. A. (Successful.)

11—1853. Fishing places. (Successful.)

b. Five Commissioners, Two by Each Power, a Fifth by These
Four, or by Lot.

2—1794. Claims against Britain. (Successful.)

3—1794. Claims against U. S. A. (Failed.)

c. Two Commissioners, One by Each Power.

4—1814. Passamaquoddy Bay. (Successful.)

5—1814. Lakes, etc., Boundary. (Successful.)

6—1814. N. E. Boundary. (Failed.)

d. Four Commissioners, Two by Each.

8—1822. Value of slaves. (Failed.)

In part.

e. Three, one by Each Power, These to Choose a Third, and if They
do not Agree, the Third to be Appointed by a Foreign Sov-
ereign, or Representative.

12—1863. H. B. Co. claims. (Successful.)

King of Italy. (Two only acted.)

14—1871. St. Alban's claims. (Successful.)

Spanish Ambassador.

15—1871. Halifax award. (Successful.)

Austrian Ambassador.

f. Five, One by Each Power, Three by Foreign.

13—1871. Alabama Claims. (Successful.)

King of Italy, Emperor of Brazil, Pres't of Switzerland.

g. Seven, Two by Each Power, Three by Foreign.

17—1892. Seal Fisheries. (Successful.)

King of Italy, King of Sweden, Pres't of France.

h. Six, three by Each Power.

18—1903. Alaska Boundary. (Successful.)

i. Hague Tribunal.

19—1909. American Fishery Rights in St. Lawrence Gulf, etc. (Successful.)

At the very most only six failures in nineteen references. Of the failures, no less than three were in references concerning the troublesome North Eastern or Maine boundary. Two of the other references were rendered unnecessary, and only one was a real failure by reason of defects in the tribunal,—that is the reference under the treaty of 1794 of the amount of the damages to be paid by the United States—No. 3 in the list above.

It remains in the very few moments at my disposal to consider how the treaties and the awards under them were received. The Jay Treaty of 1794 was received with a fair amount of favor in England; Canada did not count in those days. But in the United States it was received with an outcry of such violence as has never been excelled and seldom equalled even in this favored

part of the Lord's dominions. Jay and Washington [who sent him] were hailed as traitors to their country—they had sold their country to their enemies and disgracefully betrayed her interests. Jay failed of that which was the object of his honorable ambition and for which he lived,—the presidency of the United States. He did get five votes once from Connecticut—Connecticut always knows a good thing when she sees it—but that was the most he ever got for the presidency of the United States. And I am not sure Washington did not omit to run for the third time (applause) owing to the venom with which he was covered by the democratic-republican party! If that suspicion is at all well founded, those—if there be those—who are troubled because he did not run for the third time may console themselves by the fact that the rule which is said to prevail—that no person can be President of the United States more than twice—would probably never have been heard of had it not been for the utterly unjust assaults made upon the best of their countrymen by the democratic-republican party! (Laughter.)

The treaties which followed, until we come down to 1871, were received with a great deal of approbation by everybody. In 1871 the treaty was not received well in Canada by the majority or at least a large part of the people. It was thought by many Canadians that the treaty was signed for imperial reasons and that the interests of Canada were not so much conserved as they might have been; but it was ultimately passed by the Canadian Parliament, and all dissatisfaction has long been dead.

Then there was no trouble about any treaty until we come down to the Alaska award. It is impossible for one who troubles himself about accuracy to close his eyes to the fact that Canada was not satisfied with the personnel of that Board, even before the commissioners began their work. I am not justifying, I am not excusing; I am stating the bare, bald fact as I know it. Canada was not satisfied with the personnel on the American side of the Board of "impartial jurists of repute" with all of those who were appointed arbiters—I do not mean one of them who is above suspicion, but I mean a certain other or others of them. And Canadians generally believed—it was their understanding, right or wrong—that at least one, and perhaps two, of these impartial jurists had already before appointment expressed a firm determination and intention not to give up any part of the American contention (whether that is true or not, I do not know; and I am not arguing it). The award was not signed by the two Canadian arbiters, and Canadians cannot be got to believe that the award was signed by the English arbiter on judicial—or on any other than diplomatic—grounds. Whether that is true, I am not troubling myself to discuss.

Then comes the award of the fisheries. I have already spoken

about that and there is no necessity of saying anything more about it. The award made by the Hague Tribunal was received by acclaim by all parties; and apparently everybody was convinced that hereafter at all events everything should be left to a tribunal like that.

It is impossible, however, not to recognize that treaties of arbitration do not appeal to the imagination; there is no glamour about them as there is about war; there is no serried march of enthusiastic, shouting men; there is no glitter of arms and armour; there is no waving battle flag; no waving of banners; no war-cry. What international treaty of arbitration could have stirred the hearts of some of the people of this nation as did "Remember the Maine!" We must not forget that there is a great deal of the brute yet left in man; passion and prejudice still have the upper hand over cool, calm judgment. No election ever was fought on an arbitration treaty as an election was fought on "54-40 or fight!" No candidate appeals to the electorate by showing what he proposes to do by an international treaty of arbitration in the way of good-will towards men of other countries, and peace on earth! The astute politician if he has been guilty of anything of the kind in the past conceals it, explains it away or possibly even denies it. Now in all countries in which the people govern, it is the people who must be reached. The voter has to be educated; institutions, gatherings like this must not relax their efforts; you must educate your masters. The people of the United States and the people of Great Britain and the people of every other civilized country must be educated until they see what is right and what is just. *Vox populi* is often called *vox Dei*; the millenium is not very far off when *vox Dei* becomes *vox populi*, for "thus speaketh the Lord of Hosts: 'Execute true judgment, show mercy and compassion every man to his brother.'" (Applause.)

The presence of a large number of my old friends here induces me to say what I have already said in substance on more than one occasion and to more than one gathering in this state and in other parts of this great Union. In my view, there never will be a union, politically, a reunion of all the English-speaking people. There is no sentiment in the United States opposed to the republican form of government. Sixty years ago there was much sentiment in the islands of Great Britain and elsewhere for a republican government throughout the British world; that—thanks largely to the glorious life of her late Majesty, Queen Victoria—(applause), is all gone. We must have our two flags. We have the old Union Jack, the flag that braved a thousand years the battle and the breeze, on which the sun never sets, and which is the emblem of liberty throughout the whole world; you have the younger flag, also sun-kiss'd and wind toss'd, with the

same three historical national colors—red, white and blue—not mingled in quite the same way as in the Union Jack but equally standing for liberty and justice and right, and there never will be, I venture to think, a union in the way of a treaty for mutual, common offense and defense; I do not think that will ever come about; I do not know that I wish it; I do not know that any true friend of peace does really wish anything of the kind. "The letter killeth, but the Spirit giveth life." But there is that which is more binding than any parchment bond, there is that which is more enduring than words in ink, written by quill or steel—there is the union of hearts, and it is that union which I hope to see in the future, as in the past, but warmer and firmer, between these two great peoples; two peoples as I have said descended largely from the same stock, with the same language, the same literature, the same religion, having every aspiration in common, must needs, so long as the moral law is moral law, so long as God sits on his throne, stand side by side and march side by side if necessary for the cause of truth and justice and righteousness. And it is that union to which I am wont to apply those beautiful words of your own great poet:

"Sail on, O Union, strong and great!
 Humanity, with all its fears,
 With all the hopes of future years,
 Is hanging breathless on thy fate!
 Sail on, nor fear to breast the sea;
 Our hearts, our hopes are all with thee;
 Our hearts, our hopes, our prayers, our tears,
 Our hopes triumphant o'er our fears
 Are all with thee,—are all with thee!"

(Applause.)

THE CHAIRMAN: Mr. THEODORE MARBURG, of Baltimore, will submit some observations on the argument made by Mr. Dennis.

THE ARBITRATION TREATIES OF 1911

REMARKS OF MR. THEODORE MARBURG

I seem called upon to perform the function of a question mark in this Conference. It is my duty now to question some of the conclusions reached by Mr. Dennis in his searching and helpful analysis of the peace treaties. The matter is too serious and too important to go undiscussed. I am going to ask you to consider with me certain phases of it.

True liberty is attained only through restraint. Plato defined the free man as he who is sufficiently master of his passions to be governed by reason in choosing between good and evil. In the light of this definition are the nations free to-day? Is there any one of them that would not abandon part or all of its armament if it were free to do so? They can reach liberty only

through wise restraints which they may agree jointly to impose upon themselves. These treaties constitute a step in this direction.

And what about the theory of righteous wars held by the arch-opponent of the treaties? Can the society of nations be free so long as individual nations are unrestrained in the application of that? Manifestly, the difficulty about that theory is the question who is to determine righteousness! Every nation thinks its cause is righteous. If it is a big nation and a powerful nation, it knows its cause is righteous and can prove it! If the "holier-than-thou" group were encouraged to prowl around the world seeking a chance to discipline the backslider, society would be worse than a Donnybrook.

Mr. Dennis made an admirable defense of the treaties as framed and signed on August 3rd. It was when he reached the point where he took the position that the value of the treaties had been entirely destroyed by the Senate amendments that I found myself at the parting of the ways with him.

Let us compare the treaties as amended by the Senate with the existing treaty of April 4, 1908. First of all we have a great preamble in the new treaty of August 3, 1911. I shall refer to the English treaty only, because the French treaty is practically identic. That preamble obligates the two nations to settle all differences peaceably. If it were a treaty between an enlightened power and a backward power, or between two backward powers, the preamble might have little value. But you have here a treaty between two great moral nations, with traditions of self-respect, with traditions of honor and of living up to their obligations. For them the preamble must constitute a great moral obligation.

Next, under the treaty of 1908 questions of honor are excepted. In the new treaty they are included. Under the treaty of 1908 questions of vital interest are excepted. Under the new treaty vital interests as a category are not excepted, but only certain specified vital interests. Isn't a treaty bigger, broader, which excludes from arbitration only certain specified vital interests rather than excluding questions of vital interest as a category, with the possibility of nations reading into that term anything they have a mind to?

Then, we still have in the amended treaty the Joint High Commission of Inquiry. The Senate struck out the third clause of Article III, but that clause provided only that the commission of inquiry should decide whether a question was justiciable or not. Striking out that clause did not strike out the provision for the commission of inquiry. We know how a possible war between England and Russia over the Dogger Bank affair in 1904 was avoided by referring the episode for investigation to the International Commission of Inquiry at The Hague. We know how,

for many years, labor disputes in the public service corporations of Massachusetts have been composed by inquiry. We know how, under the wise provisions of the Canadian Trades Disputes Act, the mere investigation of facts, without any pronouncement pro or con, has quieted disputes. The experience of our own Bureau of Corporations supports the view that merely turning on the light serves to correct not only illegal practices but unjust practices as well and does it without resort to a court of law or even to arbitration.

Under the treaty of 1911, if one of the countries demands it, questions must be referred to the Joint High Commission of Inquiry. In the old treaty of 1908, which, by the way, expires next year, there is no such provision. Of course it is always possible to go outside of the existing treaty; we may resort to The Hague Commission of Inquiry, and when we do that, we find there a commission of inquiry superior to that which would be organized under the first alternative offered by the new treaty. The Hague Commission of Inquiry provides for only one national of each disputant, the balance of the commission being non-national. Such a commission is superior to one composed of three nationals of each of the disputant nations, as provided under the first alternative of the treaty of 1911. But the treaty of 1911 states that the commission "may be otherwise constituted," and under this second alternative we may aim higher than the constitution of the Hague Commission; we may get a commission composed entirely of non-nationals, and I believe that even the United States Senate, under the pressure of public opinion, may at some time—not to-day or to-morrow, but in the course of a measurable number of years—be brought to that high position of constituting the commission entirely of non-nationals.

Another feature of inestimable value still remaining in the new treaty is the provision for a delay of one year, if desired by either party, in the reference to the commission of inquiry. Let some episode like the Casa Blanca affair stir up bad feeling between two nations and the value of such a provision becomes at once apparent.

Mr. Dennis has expressed the opinion that there is no possibility of war ever arising between the United States and Great Britain or between the United States and France, and that therefore the treaties signed August 3, 1911, were of value only as a type which we were to follow in framing treaties with other powers. I venture to question that conclusion. Only yesterday we were on the brink of war with England over the Venezuelan question, and but for England's splendid magnanimity at that time, we should have had a war unspeakably disastrous.

There is always danger that a similar situation may arise. If we had had a treaty like this, had had a commission of inquiry,

reference to which was compulsory on the demand of one country, is it likely Mr. Cleveland would have sent his warlike message?

We come next to the provision for the settlement of justiciable questions. Serious effort is being made to establish a true international court of justice, for which this Conference has stood almost from the beginning. Is there any better way to set such a court going, when established, than to provide for the arbitration of justiciable questions? Both the President and the Secretary of State put those words "arbitral tribunal," into this treaty advisedly, with a view to making use of the prospective Court of Arbitral Justice. When that court shall have been established, when it shall have won the confidence of the world, all questions under Article I (justiciable) will naturally go to it; so that, instead of waiting for years for the court to come into operation, we shall find cases ready for it. We know how easy it is to interpret into any question a legal element when the nations are so disposed. As Mr. Justice Riddell has just said, it is the disposition of mind between the United States and Canada which has made possible a peaceful settlement of our disputes and it is a disposition of mind which will find a legal element in questions when there is machinery at hand for dealing with such questions.

Just one word more in regard to the specific questions withdrawn from arbitration by the amendments to the treaty. I need not enumerate them; you are familiar with them. All of them, excepting the question of territorial integrity, are questions which the advocates of this treaty said could not be arbitrated under the treaty anyway. And remember that we are relieved by the amendments only from the obligation to *arbitrate* these questions; we are not excused from the obligation, imposed by the preamble, to find a way to adjust our differences peaceably. The treaty provides for the arbitration of justiciable questions, the President regarding arbitration as essentially a judicial process. But arbitration is not the only means of settling disputes. We may turn to diplomacy, to mediation, inquiry, or to new devices yet to be set up. The important thing is that this great preamble stands above the exceptions, obligating two great moral nations to settle all their disputes without resort to war.

After the defeat of the Olney-Paunceforte treaty we waited fifteen years for another all-inclusive treaty, the treaty now under consideration. If we fail to proceed with it, what assurance is there that another decade will not go by before we take this momentous step? To frame a treaty similar to the original treaty of August 3, 1911, with some new power, in the hope of getting the Senate to reverse its position, is not promising. Would not that body make answer to the executive department

of the government "we have but recently declared that we would not make such a treaty. Why do you come to us with another?" (Applause.)

THE CHAIRMAN: Upon this topic, in conclusion, we are to hear briefly from the successor in Boston of our long-time friend and leader and ornament of this Conference—Dr. Hale—Rev. Dr. EDWARD CUMMINGS, of Boston.

REMARKS OF REV. DR. EDWARD CUMMINGS

Mr. Smiley began the Conference by stating that he was an optimist—I think he said of the first class. He enumerated many reasons why everybody ought to be an optimist. And other speakers have brought forward many additional reasons why we all ought to be optimists of the first class.

I feel, first of all, that we ought to show our optimism by sending our profound congratulations to the President of the United States. It is a good time to congratulate him. He has troubles of his own; and I am quite sure that it would be pleasant for him to realize that this Conference feels that he is to be congratulated, perhaps above all other men, for the record which he has made for himself and for the cause of humanity in these last few months. Whatever else has happened, we are able to congratulate him that his position is assured in the history of the world! (Applause.) I think in the second place that we might congratulate the American people on having shown such splendid capacity for rising to an appreciation of the high ideals he has set before them.

Sometimes—as in some paragraphs of the speech the Chairman made yesterday—people are inclined to intimate that the public needs a vast amount of elevating and educating. Well, it is worth while remembering at such times how largely our people put their minds and hearts into the splendid idealism which was represented in the great popular movement for the ratification of the arbitration treaties. The trouble really is, we let the public down too easily and too frequently. If you do not keep the high ideals constantly before them, if you do not have the machinery which the people who are advocating other things have and use,—then you must not blame the people too much for following those who are better organized and those who on the whole appeal more strongly. Personally, I agree that the people of the United States, like myself and I dare say like yourselves, do need a good deal of educating; and for that very reason I believe that it is up to us and to all advocates of this movement to keep the school of peace going all the time. If, as we believe, the issues which we represent are absolutely fundamental for the welfare of our country and the future of civilization, we ought in times of political agitation like the present, to keep saying to

the people, "Remember these things, and remember who stands for these things."

It is said of a distinguished French philanthropist that he ordered his servant to wake him each morning with these words, "Remember, Monsieur le Comte, you have great things to do to-day!" That, I believe ought to be the inspiring motto written in the heart of every friend of the peace movement, "Remember, you have great things to do to-day!"

For there never were greater things to do than you are called upon to do to-day; there were never things so important for individual morality, for the success of your own country, or for the welfare of civilization. There never was greater opportunity for men and women to do godlike work. And I believe that this Conference is furnishing inspiration for that work.

You want help, because you have such great things to do. To whom shall you go for help? "Oh," you say, "we have arranged to go to the schools. We have Mrs. Andrews and a lot of other useful people to attend to that." It is a good thing to go to the schools, and train the rising generation to help the great cause.

Then you say, "We are going to the universities." Good, you need to go to them vastly more than you have done. You need to teach them that the one great lesson written on every page of universal history is that this is a dying world; that histories are nothing but obituaries; that the verdict of history is thus far a coroner's verdict. One civilization after another has gone down because it was not able to find the law of life; and you need to teach them that one of the great diseases of which civilizations have died is this disease of strife and war which you are trying to prevent. Teach them these things. It is good economics; it is good philosophy; it is the only way to profit by the lesson of history. Teach them the next great step forward in the process of evolution. Teach them that there are nothing but families in the world—social, industrial, political families, municipal families, national families, and most and best of all this new family of nations which in the process of evolution you have the infinite opportunity and satisfaction of helping into existence. Teach them that there are nothing but families in the world, and that the supreme law of life—economic, social, political life, national and international life—is the great family law, of the rational devotion of the strong to the weak, which makes the weak strong, and the strong stronger, and the whole world better. That is the real lesson. Go to the young men and women in our universities and make them strong to do their part in the great work.

You are also going to the churches, you tell me. Yes, go to the churches. Your great peace President has virtually been asking us to take our religion at least a little seriously; to re-

member what religion is, what it stands for,—the great Divine family, and the family ideal of co-operation and devotion of strong to weak. Teach them that every church is a peace society,—or it does not deserve the name of church. Teach them that the people in the pulpits and the people in the pews are recreant and false to their ideals unless they make of their organization first of all a great means for the propaganda of the gospel of peace and good will.

And let me add just one word more. After you have done these things,—after you have gone for help to the children in the schools, and to the youth in the universities, and to the men and women in your churches,—then one thing more. Go to the people! Democratize the peace movement! We are too good. That is the trouble with our peace movement. We are too select. I do not see here representatives of trade unionism, of labor,—the men whose words sway thousands upon tens of thousands. Your documents and publications about peace do not get to the great mass of the people. (Applause.) Go to them; educate—not your rulers, as has just been said,—but educate your brothers and your sisters in the great social, industrial and political family. Until you democratize the peace movement, until you meet here in this great council with the representatives of that great body, without whose co-operation we gain nothing, you will never attain your high ends! (Applause.)

THE CHAIRMAN: I think it will interest the Conference and the last speaker to know how far the peace movement has gone in these recent years. There are trade unions in the United States which set apart one evening a month for the reading and discussion of the literature which reaches them on the subject of peace and arbitration, and they were among the most effective supporters, by petition and resolution, of the movement for the ratification of the recent treaties. In Great Britain the most effective peace organization in existence was founded by a working man and is to-day supported and kept in vigorous operation, after his death, largely by representatives of the Labor party in and out of Parliament. In Germany and France the great labor organizations were the chief consumers last summer of the document written by Lord Haldane on "An Appreciation of Germany," at a time when the contention was at its greatest. It is rather surprising how profound and intense the interest in peace and arbitration is among the better informed working class, wage-earning element in this and other countries. (Applause.)

We now pass to the second topic of the morning, "International Courts." I have the pleasure to present as the first speaker a representative fellow citizen from the State of Georgia, formerly President of the Bar Association of that State, and one who has been honored by his fellow citizens with election,

not only as Mayor of Savannah, but at different times to each of the two branches of the Georgia Legislature, Honorable PETER W. MELDRIM.

WHY A REAL INTERNATIONAL COURT IS NEEDED

ADDRESS OF HON. PETER W. MELDRIM

That peace is a blessing and war a curse; and that the peoples of earth prefer peace to war, are truisms. The object of an international court is to settle controversies between nations without war, and the question is: How can that result be best attained? Permanent and universal peace cannot, in reason, be expected. No system of law and no tribunal have ever yet been devised that can absolutely prevent wrong and bloodshed among natural persons. But just laws and their rigid enforcement lessen the violation of the rights of persons. If the rights of nations could be determined by law, and the judgments pronounced by the law enforced, then there would be a reduction to a minimum, of the violation of national rights and the preservation, to the largest degree, of the world's peace. Mere sentimental appeals for peace avail little. If peace is to be won, it must be by enlisting, in the army of peace, the same strong forces that give victory in war. Peace will never come through the denunciation of a nation's heroes. It will never come by the destruction of the military pride and spirit of a people. It had better never come than come crawling, in base submission to wrong and insult. A just war is better than a dishonorable peace; and no greater curse can befall a people than the destruction of that patriotic spirit which stands ready, in a cause that is just, to rally to a nation's colors and to take no account of blood or treasure expended in their defence.

Rear-Admiral Mahan, in one of his articles, insists, that "the inter-relations of independent States are not susceptible of establishment and adjustment upon a basis of law." And he asks: "Will a power like Germany willingly forego the prospect of national aggrandizement and the hope of territorial gain?" These two objections, one general and the other specific, are not without force. The objection as to Germany and other nations similarly situated is hardly proper to be discussed here, and it is not necessary to answer the question, for the reason that an international court of justice would have no jurisdiction over a nation that did not voluntarily become a party in that court. I assume that "national aggrandizement and the hope of territorial gain" may be realized without war, and that the people of Germany are no more inclined to engage in an unrighteous war than are the people of other civilized nations.

If the inter-relations of independent States are not susceptible

of establishment and adjustment upon a basis of law, then an international court of justice is an idle dream. But we are at a loss to comprehend why these relations may not be established and adjusted by law. The difference between Admiral Mahan and his school of thinkers and those who insist that judicial determination of international disputes is wise, humane, patriotic and practicable, is more apparent than real, and is due to the fact that definitive words are not used by the respective schools in the same sense. If by the term "law" is meant "a rule of civil conduct prescribed by the supreme power in a State," then the inter-relations of States could not be established and adjusted by such a rule, because the supreme power in a State is the sovereignty of a State, is the State, and the State cannot be sovereign and subject at the same time. But it does not follow that sovereign and independent States may not submit their controversies to judicial determination. The States of this Union, in their relations with each other, are separate, sovereign and independent, and yet, under the constitution, they have delegated to the judiciary the power to hear and determine controversies between States. There is no more reason why the nations cannot grant to a tribunal the power to hear and determine controversies between them, than there was to inhibit the federal judiciary from determining controversies between the States in the American Union. So the term "international" is used in too restricted a sense. An international court should not only take jurisdiction over matters pertaining to and mutually affecting nations, but it should also take jurisdiction of matters governed by private international law, and this should be so, because such matters most frequently involve nations in war.

Mr. Justice Bradley, in the *Crutcher* case, in 141 U. S., says: "The prerogative, the responsibility and the duty of providing for the security of the citizens and people of the United States in relation to foreign corporate bodies or foreign individuals with whom they may have relations of foreign commerce belong to the government of the United States." This duty thus resting on the government of the United States to protect private rights with foreign bodies or individuals can only be discharged by diplomacy or war. We desire to avert war, not only for the sake of economy and humanity, but for the stronger reason that the decision of the sword is not always just. On the contrary, the stronger power is usually not only the victor but the aggressor.

Diplomacy can accomplish much, and through it differences may be adjusted, arbitrations agreed to, and treaties entered into; but diplomacy is devious in its methods, uncertain in its results and utterly helpless to enforce the conclusion which it reaches. Arbitration is not usually satisfactory in private matters, and it cannot be hoped to be more satisfactory in international affairs.

Arbitrators are not trained jurists, and, instead of deciding according to the customs of the law, seek to accommodate the difference in that manner which to each arbitrator seems to him to be most in consonance with his own views of justice and equity. So far as possible, the rights of nations, like the rights of individuals, should be determined by fixed and well-established rules of law. The nearest successful approach which we now have to the settlement of international controversies is in the increasing number of treaties that are being entered into between nations. Yet, treaties at best are but poor substitutes for a great international court. In this country two-thirds of the Senators must concur in a proposed treaty. Whether that limitation on the treaty-making power is founded in wisdom or in folly, it is not now necessary to decide, but this much is true, that however desirable it might be to us that other countries should enter into treaties with us, yet, such treaties cannot become effective without the advice and consent of two-thirds of the Senate. How far party zeal, or popular prejudice, may prevent the consent of the Senate I do not pretend to say, but we must recognize, in the light of the debates in the Senate on the general arbitration treaties, that to make treaties comprehensive enough to cover all justiciable matters is a legislative impossibility. Even if such treaties are made, they are inelastic, and like the terms of any other written contract, must stand as they are written. Unlike a contract between persons, which can be construed by the courts and enforced by lawful process, the construction of a treaty is by the parties thereto, deciding in passion as judges in their own case, writing their opinions in blood, and seeking to enforce them by the sword.

The logical conclusion is, that these controversies should be judicially determined by a tribunal, wherein parties receive their dues and are accorded their rights. This result can be best attained in a court duly constituted, the time and place of its sessions being fixed, and its jurisdiction clearly defined. I am aware that objection has been made to submitting questions of national honor and vital interests to arbitration, and I assume that like objection would be made to conferring unlimited jurisdiction on an international court, but, at first, the jurisdiction could be limited, and subsequently enlarged, if found wise to do so. At all events, there should be no question as to the jurisdiction and power of the court, while its procedure should be simple and its process effective. There should be no distinction between legal and equitable rights. The decisions of a great court would become precedents and develop a system of law by which the relations of states would be governed and their controversies determined.

That controversies between nations do arise is conceded. That they should be settled is admitted. A decision by war is not nec-

essarily a righteous decision. A settlement by diplomacy is most uncertain. A determination by arbitration is usually crude and unsatisfactory, while diverse construction of treaties lead to controversies which being settled neither by diplomacy nor arbitration result in war.

The most interesting question to me has been, not who shall be the parties, not what shall be the jurisdiction, not what shall be the pleadings and practice, but how can the decrees of the court be enforced. A judgment, decree or sentence is enforced by levy, attachment or arrest. Back of sheriff and marshal stands the power of the State and Government, and the Governor of every State and the President of the United States are sworn to enforce the process of the courts. So it is in the enforcement of law in every civilized country. How then can the decrees of an international court be enforced? They can and should be enforced in the same way. Back of this court should be the armies and navies of the nations. Moral force may be sufficient to enforce the performance of a decree, but that force is greater when back of it is a physical force ready to support it. If the nations would agree to the creation of an international court of justice, contracting to sustain the decrees of the court by force of arms, then military and naval establishments could be reduced, so that the army and fleet of a nation need only be large enough in co-operation with the allied armies and fleets of the other contracting parties to enforce the final judgment of the court, and thereby protect rights, redress wrongs, and preserve the peace of the world. (Applause.)

THE CHAIRMAN: As the next speaker I present the Chief of the Bureau of Trade Relations of the State Department, Mr. JOHN BALL OSBORNE.

THE SETTLEMENT OF COMMERCIAL DISPUTES BETWEEN NATIONS BY THE PEACE SYSTEM

ADDRESS OF HON. JOHN BALL OSBORNE

There is nothing about a commercial dispute between nations to justify its sharp differentiation from other disputes as regards the broad policy of arbitration. It might also be suggested that several of the twelve cases that have thus far been referred to the Arbitration Court at The Hague, of which at least nine have already been decided, involved questions affecting the business interests of the litigant countries. For example, the North Atlantic Fisheries case involved the American fishing industry; the Venezuela preferential case related to claims arising in part for money loaned for the construction of public works, while the Orinoco Steamship Company case related to a claim founded on a concession for steam navigation in Venezuela. In some aspects

therefore, these cases might come under the head of commercial disputes ; but, nevertheless, none belongs precisely to the class of cases that I had in mind when I selected my subject.

My purpose is to advocate recourse to an appropriate international tribunal for the amicable adjustment of commercial differences between nations which have been diplomatically espoused by their respective governments and which diplomacy has been unable to settle after a reasonable time, thereby causing substantial disturbance and loss to the business relations between the countries concerned. It is understood also that these are cases where either the complainants have exhausted their judicial remedies in the foreign countries or no adequate remedies exist for them.

The primary purpose of the founders of The Hague Court was to provide for the peaceful settlement of only those disputes which threaten war between the parties. This was what the "August Initiator " had in mind ; this was what the First Conference sought to accomplish, and this was what the Second Conference sought to perfect. Even the project for an international tribunal which Secretary Hay gave to the American delegates to the Conference of 1899 contained the words " in order to aid in the prevention of armed conflict by pacific means " as the avowed purpose of the proposed court. But the serious extension of the policy of arbitration to commercial and minor disputes between nations is a matter that is left to the Third Conference, which presumably will be held in 1915.

The Hague peace system was measurably improved and developed by the work of the Second Conference in 1907. The Permanent Court of Arbitration, which has steadily risen in favor, and the International Commission of Inquiry, which had amply justified its existence by its usefulness in the Dogger Bank incident of 1904, were revised and improved in the light of the previous experience of eight years. An important change was the introduction of the Court of Summary Procedure.

Another equally important innovation was the provision looking to the establishment of an International Prize Court to settle peaceably and by judicial methods controversies arising between different states involving the validity of capture in time of war. According to the plan of this tribunal the judges are to be selected in rotation from the different countries, some of the great powers to be permanently represented on the bench. The outlook for this prize court is so promising that the proposal has been made on the part of the United States that, when established, it act as an international court of arbitral justice, having regular sittings and a wide jurisdiction, precisely like the Supreme Court of the United States.

The advocates of a new court of arbitral justice, to supplement,

but not to supersede, the present Court of Arbitration at The Hague, point out that the tribunal established by the First Conference is not really a permanent court, since it is not permanently in session, but must be constituted anew each time by the joint act and co-operation of the parties litigant. In fact, as regards permanent status, it is little more than a panel of judges, in the nature of a jury list, available for selection as the occasion arises. Notwithstanding the improvement to be expected from the introduction of the new system of summary procedure, The Hague Court is considered by many as too cumbersome for ordinary use and a trial before it is undoubtedly very expensive. Excepting where highly important international issues or large sums of money are involved, the tribunal is not likely to be much used.

These considerations have led the United States, from the outset, to favor the establishment of an international court of arbitral justice which shall be permanent, free and easy of access, with wide jurisdiction and regular sessions, and with its machinery always in readiness, so that cases of minor importance, as well as issues of fundamental importance, may be submitted for reasonably expeditious and inexpensive settlement. This court would be composed of judges representing the different judiciary systems of the world and capable of insuring the continuity of arbitral jurisprudence. Such a court has been strongly advocated by President Taft and Secretary Knox, and its establishment will surely constitute one of the most important features of the work of the Third Conference.

It is not difficult to cite several cases in the recent experience of the United States government that might appropriately be submitted to an international tribunal such as I have in mind. Two or three, however, will suffice for the purpose of illustration. One is the famous potash controversy between the United States and Germany. It involved the nullification by an Imperial German Law of the advantages of certain contracts made by American citizens for the purchase in Germany of large quantities of potash, a commodity in which Germany enjoys a virtual commercial monopoly and which is a veritable necessity in our own industrial economy, being used in this country to the value of \$12,000,000 annually as a fertilizer and in the manufacture of chemicals and high explosives, American industries representing an investment of \$500,000,000.

These American contracts called for an extremely low price—about \$20 a ton for muriate of potash, delivered United States ports—while the German syndicate price was then about \$34 a ton. The contracts were made in good faith at a time when there was an open market, by reason of the temporary dissolution of the German Kali Syndicate. A few months after the making of the contracts the German Parliament, having them before it,

enacted the Potash Law on May 25, 1910, which regulated the production and distribution of this product, and imposed a penalty tax, amounting for muriate to about \$22 a ton, on the production of any mine in excess of the quota allotted to it by the government under the law. The quotas allotted to the syndicate mines were large enough to supply the entire trade of the world, while the allotments to the two independent mines with which the American contracts had been made were limited to one-fourth of their actual sales to the Americans. Hence the law made it impossible to carry out the terms of the contracts and thus virtually invalidated them. This action affected the price of potash used by two million American farmers besides the manufacturing uses, involving consumers in nearly all the states along the Atlantic Coast and in the tobacco and cotton belts of the south, the product being used in the culture of cotton, tobacco, grain, hay, potatoes, fruit and other crops.

Struggling for their contract rights, the American interests held repeated conferences with representatives of the German Kali Syndicate, and the Department of State used its good offices in their behalf, in the hope of enabling them to reach an agreement which would leave unimpaired the contract rights of American citizens. In the final settlement the original contract prices were not recognized, although fortunately a substantial reduction in the price of potash was obtained as the result of the activities of the Department of State.

In this controversy Germany denied that the law had been framed with the intention of discriminating against the United States, and claimed that it was designed to correct abuses in the potash industry and to conserve the natural resources of the Empire. Germany further contended that the American buyers had agreed in their contracts to pay any "governmental charges" and that this language would include the excess-production tax. It was also pointed out that the courts of the Empire were open for remedial justice under the contracts.

This is a brief and necessarily incomplete, synopsis of this extremely complex and difficult controversy which involved so many novel points as respects conflicting systems of jurisprudence and national legislative policies that it is no matter of surprise that the good offices of diplomacy should fail to adjust it. It is my own opinion that it might properly have been referred to an international tribunal such as I have in mind had there been one in existence. While some phases of the case might not appear to be justiciable, it would seem that the entire controversy might be brought within the sphere of international conciliation without impairment of vital national interests or domestic policies.

Another stubborn and difficult commercial question is the controversy between the Austrian government and the Vacuum Oil

Company in relation to its business operations in Austria. This Company is American owned, but incorporated under the laws of Hungary and permitted to do business in Austria. Some years ago it established an extensive plant in Austria in order to participate in the petroleum business of that country. According to the complaint of the Company, the Austrian government has, since 1910, enforced against it a series of drastic, repressive and confiscatory measures, with a view to forcing it either to comply with certain requirements which it believes are unjust, or to go out of business. These measures include preventing the Company from obtaining supplies of crude oil, compelling the removal of its tank cars from the Austrian State Railways and otherwise depriving it of necessary transportation facilities, and suspending the distribution of its products in tank wagons. As a result of the controversy the Company's plant worth several million dollars stands virtually idle.

The Vacuum Oil Company has invoked the stipulations guaranteeing mutual liberty of commerce in the commercial treaty of 1829 between the United States and Austria-Hungary, and has claimed the right to do business on the same favorable terms as are accorded by the Austrian government to a similar company representing another foreign nationality. Like restrictions had been imposed by Austria on this other corporation, but these were withdrawn, it is claimed, as the result of diplomatic representations. So far the most earnest efforts to secure remedial action by Austria in the case of the Vacuum Oil Company have been unavailing.

Still another case which naturally comes to mind in the experience of the United States government in recent years is the persistent refusal, on sanitary grounds, of the governments of Germany, France, the Netherlands, Austria-Hungary, and all the Scandinavian countries to admit American live cattle for slaughter. It is claimed that these cattle are liable to be infected with Texas fever, or perhaps tuberculosis. The government of the United States has repeatedly assured foreign governments that the system of federal inspection surrounding the preparation and shipment abroad of live cattle is so thorough as to furnish a sufficient guaranty against the introduction of animal diseases and that hence the prohibition of the importation of American cattle constitutes a discrimination against the United States. Our government has further declared that the sanitary conditions in this country, at least in the regions whence exportations would be made, are not such as to justify the continuance of the foreign restrictions and it has invited those governments to send to the United States an official commission of inquiry. These proposals have not been accepted and the discrimination continues. It would seem that this, too, is a question that might easily be settled

by some method of international conciliation—perhaps even by an international tribunal, which might find it desirable to despatch an impartial commission of inquiry to the United States to investigate and report the facts to the court.

While modern commercial disputes between nations do not ordinarily endanger the peace between them, they are always irritating and usually prejudicial to international amity and good relations. Not infrequently they are a menace to mutual trade development. At one stage the potash case threatened a commercial war between the United States and Germany, an event that would have been most disastrous economically to both nations, involving directly an annual foreign commerce of \$450,000,000, of which American exports represent \$300,000,000, and indirectly scores of productive industries in both countries, with their myriads of workers. The United States has never had a tariff war with any great commercial power, and the extent of the calamity can only be conjectured from the sad experience of France, first with Italy in the years 1888 and 1889 and then with Switzerland from 1893 to 1895.

The consequences of the Franco-Italian tariff war were very serious to both countries. In 1887, the year before the conflict, French exports to Italy were valued at \$63,000,000; in 1888 they fell to \$30,000,000. In 1887 Italian exports to France amounted to \$60,000,000; in 1888 to only \$35,000,000, and in 1889 to only \$26,000,000. In 1887 France took 78 per cent of Italy's exports of wine to the world, but in 1888 only 45 per cent. France suffered particularly in her exports to Italy of silk, cotton, and woolen goods. Only partially did either country find other foreign markets in which to recoup itself for the losses. Both the contending nations were greatly injured and the competitors of each were the only ones to profit by the struggle. The disturbing effect on the mutual commerce of this tariff war lingered for ten years, although acute hostilities were at an end by 1890.

It was much the same with the Franco-Swiss tariff war. Each side suffered severe loss in trade and none was benefited excepting the commercial rivals of the combatants. French exports to Switzerland fell from \$44,000,000 in 1892 to \$25,000,000 in 1894, and, in the same period, Swiss exports to France decreased from \$18,000,000 to \$13,000,000. France's export trade in wine, sugar, clothing and cattle was greatly impaired, while Switzerland suffered most in her exports of silk and cottons.

It is not amiss to remind you that the potash dispute, which was not a tariff question, threatened a tariff war between the United States and Germany which, for magnitude of consequences, would have eclipsed either the Franco-Italian or the Franco-Swiss tariff war. I believe, therefore, that no one will question the great desirability of affording an easy means of ad-

justing amicably commercial differences between nations that have been diplomatically espoused and yet cannot be settled through this agency. The establishment of an international tribunal such as I have indicated, with ancillary machinery for inquiry, conciliation, and compromise, would popularize the cause of international arbitration among business men throughout the world by facilitating the reference to it of those disputes in which they are particularly concerned, and the very existence of the system would doubtless exercise a salutary deterrent influence on any government that might be disposed to treat unfairly the commercial or financial interests of the citizens of another government in its territory.

I have anticipated that some one might raise the objection to my proposal that commercial disputes between nations be submitted to any international tribunal, that this is not practicable unless they involve questions of international law or relate to the interpretation of commercial treaties existing between the governments that have diplomatically espoused the disputes.

I would say in reply that I recognize fully that there are some commercial disputes between nations that are not suited for this treatment, particularly if they relate primarily to some well-defined domestic policy, for example, a national tariff policy. At the same time there are commercial disputes that, while apparently not susceptible of trial by a strict, perhaps technical, arbitral court, are yet susceptible of amicable adjustment by the machinery of a flexible arbitral system such as I have in mind.

I wish, therefore, to lay all possible stress on this proposition: If it is desirable to arbitrate every dispute between nations that may lead to political war, it is equally desirable to adjust amicably by the same peace system every controversy beyond the powers of diplomacy which may lead to a trade war with all its disastrous consequences. (Applause.)

THE CHAIRMAN: The concluding paper of the morning will be presented by Mr. EVERETT P. WHEELER, of New York, the eminent Chairman of the Committee on Law Reform of the American Bar Association, who has as his subject, the "Presentation of Claims to the Hague Tribunal."

THE PRESENTATION OF CLAIMS TO THE HAGUE TRIBUNAL

ADDRESS OF MR. EVERETT P. WHEELER

In the present position of the cause of international arbitration, we should bear in mind that the mere enactment of any legal proposition, however wise, is of itself insufficient. As Professor Pound of Harvard has recently pointed out, one of the most important points in the study of the problem of jurisprudence is to

consider "the means of making legal rules effective. This has been neglected almost entirely in the past. We have studied the making of law sedulously. It seems to have been assumed that when made, law will enforce itself." *

When the first Hague Convention was adopted, many diplomats were of the opinion that it was no more than a pious wish which would never be made effective. We owe it to President Roosevelt that when the controversy arose between Mexico and the United States with reference to the disposition of the so-called "pious fund," the controversy was referred to the Hague Tribunal. Since that time the court has held numerous sessions and has disposed of some important controversies. But during more than half its existence, it has not been in session. Little attention has been paid to the important task of making the access to that Tribunal more easy. The old diplomatic methods have largely been retained. These took no account of an international tribunal capable of deciding controversies between citizens of different countries. There is perhaps nothing more conservative than diplomacy.

I speak to-day of that great body of controversies which consist of claims against a sovereign state by citizens of another sovereign state. The courts of England and America on the whole have been disposed to hold that such controversies can only be dealt with through diplomatic channels. Perhaps no case has gone so far as that of the *American Banana Co. v. United Fruit Co.*, reported 213 U. S. 347. This was an action brought by one citizen of the United States against another. It was alleged that this defendant, an American citizen, in violation of the Sherman Act and for the purpose of creating a monopoly of the trade in bananas between Costa Rica and the United States, had procured the Republic of Costa Rica to seize the plaintiff's plantation, to drive away the plaintiff's workmen, and to destroy the plantation itself. The Supreme Court of the United States held distinctly that this was not a justiciable controversy; that inasmuch as it was alleged that the defendant had obtained the aid of a sovereign state to commit the alleged torts, and they had in fact been committed by officials of that sovereign state, no court had the right to award damages for the injury that the plaintiff had sustained, and that its only redress was through diplomatic channels.

The British courts before this time had held that the validity of an Act of State, as it was called, of a foreign government, could not be inquired into by a court of justice. To use the language of Lord Campbell in the Duke of Brunswick's case, 2 House of Lords 1, 27:

"The Lord Chancellor, I presume, would not grant an injunc-

* Harvard Law Review, Vol. 25, p. 514.

tion against the French Republic marching an army across the Rhine or the Alps."

But no English decision in my judgment had gone quite so far as this American decision. Nevertheless the last word from the Supreme Court declares the law of the United States, and justly receives great consideration from the highest courts of other nations. We may therefore consider that for the future, unless legislation should provide a new remedy, controversies such as that which form the basis of this particular litigation, will be presented through diplomatic channels.

It is, however, obvious that such controversies are, in their own nature, the subject of decision by an international tribunal. Whether the act of a sovereign state in evicting citizens of another state from property of which they were in the peaceable possession and in destroying this property, is or is not lawful, is in its nature capable of decision by an impartial tribunal. Yet it is precisely such controversies that have frequently been made the occasion or pretext for war. The war now pending between Italy and Turkey was declared for the avowed purpose of redressing injuries of this character, which had been inflicted by the Turkish government or its citizens upon Italian citizens who were lawfully in that part of the Turkish Empire known as Tripoli.

Inasmuch as the whole object of the movement for international arbitration is to prevent war, and since wars have been frequently occasioned by controversies of this sort, it would seem obvious that we should at least attempt to facilitate the adjudication of such controversies before the international tribunal at the Hague.

It is equally clear that the more we facilitate the reference of controversies to this tribunal, the more speedily shall we obtain a permanent court of international justice. The main reason—perhaps the only reason—for the character and composition of the present Hague Tribunal, is that very few controversies are referred to it; that a permanent court would not have business enough to occupy it, and that therefore it would be unwise to establish a permanent court.

And now leaving generalities, let us come down to particulars. The present method by which claims of the character mentioned are prosecuted is this: A petition is presented to the State Department, setting out the grievance alleged and asking the government to present the claim to some foreign power. An appointment is made with the Secretary of State. Counsel for the claimant undertakes to present the claim. While he is in the midst of his statement, the telephone bell rings. It is perhaps the President who desires to confer with the Secretary of State. Public business is, of course, more urgent than the private claim, and the counsel stops short in his argument and has it deferred to another

day, while the Secretary attends to the more urgent business put before him by the Chief Executive. Or perhaps the Ambassador from Siam is announced. It would, of course, be highly discourteous for the Secretary of State to refuse to receive the Ambassador of a foreign state. The hearing then is by this interrupted, and the counsel for the claimant is remitted to some other day. This day may well be remote. The Secretary of State of the United States is a very busy person, who has before him a thousand matters of great importance to the public welfare, and it is not possible that the representative of a private claimant should see him whenever, in the interest of his client, he might desire to be heard.

But let us suppose that the counsel has been heard by the Secretary. The next step in the proceeding is to refer the matter to the Solicitor for the State Department. The Secretary of State naturally desires a report from him. Accordingly the counsel attends before the Solicitor. It is true that in this hearing counsel is not interrupted by a visit from any Ambassador, but the telephone bell is just as cogent an interrupter as a visit from an Ambassador. There are, of course, many matters of great importance concerning which the Secretary requires to confer with the Solicitor, and it is needless to say that the argument of counsel loses very much of its force in consequence. But let us suppose that the counsel has been heard before the Solicitor.

It may easily happen that the very next day some public exigency may arise which may require the Solicitor to defer the consideration of the plea to a more convenient season. It may be important that the Solicitor should attend at some diplomatic conference in Europe. He may be called upon to take part in presenting a case on behalf of the United States before this very Hague Tribunal. So it may very well happen that the exigencies of public business prevent the Solicitor from passing upon the claim. He may be transferred to another post of duty, and the matter may thus have to be presented to a second—sometimes to a third—Solicitor. It is, alas, the fact that the salary of Solicitors of the State Department is not what it ought to be. It has frequently happened that a lawyer, most eminently qualified for that office, has been called away from it to some other more lucrative position, and there must be a successor who will take up the business of the Department *de novo*.

Again, let us assume that these various obstacles have been surmounted; that the second or the third Secretary of State to whom the matter has been presented, or the second or third Solicitor before whom argument has been had, is favorably inclined to the claim. It will naturally occur to you that he may feel that there are other parties in interest who should be heard

before the claim is actually pressed by the Department. It may very well be that notice should be given to the adverse parties, and that they may have briefs to present and arguments to offer. Now, it is not the usage of diplomacy that in such case the counsel for the claimant should meet the counsel for the adverse party face to face. Each presents his own case the best he can, with very little or no information as to what has been said on the other side. No doubt the claimant's petition is on file. It may be a brief is also on file. But the opportunity which all lawyers consider so important in judicial proceedings, of meeting your adversary face to face and discussing the subject orally in the presence of the tribunal that is to pass upon it, is entirely denied. And thus it often happens that claims which are meritorious, and claims which are even finally allowed, descend from generation to generation. The case of the *Brig Armstrong* is, perhaps, the most notable. That was pending for half a century. The counsel who has to present a claim before the State Department (and I do not say the difficulties there are more serious than they are in other departments), is frequently reminded of the famous lines of Spenser:

"Full little knowest thou who hast not tried,
What hell it is in suing long to bide;
To lose good days that might be better spent,
To pass long nights in pensive discontent,
To speed to-day—to be put back to-morrow."

This description of the claimant in the court of Queen Elizabeth is a picture of what has occurred many times since in the Chancellerie of every government in the world. It perhaps was inevitable in the days when there was no international tribunal; when often armed intervention was asked in order to enforce a claim; and when the propriety of such intervention might well be disputed on grounds quite independent of the merits of the claim. In short, under the old system expediency was inevitably the ground of decision, and not justice.

But now we have a court of justice. It ought not then to be very difficult to provide for the submission to that court of claims against one sovereign state made by the citizen of another. The means thereto which I would suggest are these: Let there be a Solicitor in the State Department whose exclusive business it shall be to deal with all claims presented to that Department by citizens of the United States against any foreign government. He should have an adequate salary. His duty should be to examine into these claims, not for the purpose of passing finally upon them, but sufficiently to determine whether they are presented in good faith; and whether they have any *prima facie* basis which would warrant their presentation to an international tribunal.

If they have, it should be his duty to communicate with the proper officer of the foreign state against whom the claim is made, and inform him of the claim and inquire whether or not the foreign government in question is disposed to make any offer in settlement of the claim, or whether it insists upon the claim being presented to the international court of arbitral justice. If a compromise should be proposed, it would be the duty of the Solicitor to submit this to the counsel for the claimant. If the Solicitor were clearly of the opinion that the offer should be accepted, it would be his duty to say so; otherwise the decision would rest with the claimant. If the claimant should refuse the proposed compromise, the next step would be the making up of a case and the presentation of it to the Hague Tribunal in the manner pointed out by the Hague Convention. Evidence would then be taken; that court would render its decision; and this decision would undoubtedly be respected and obeyed by all parties concerned. Here then, instead of delay, you have promptness; instead of confusion, you have order; instead of expediency, you have justice.

May we not hope that the present administration, which has done so much to promote the cause of international peace, will recommend this proposed change of method and do what it can to secure for claimants an orderly and judicial determination of their claims upon the merits? (Applause.)

THE CHAIRMAN: In the few moments before adjournment we shall have a short discussion, under the five-minute rule, of the topics of the morning. The Chair recognizes Mr. JOHN S. EWART, of Ottawa, who was one of the British counsel in the North Atlantic Fisheries Arbitration at The Hague.

REMARKS OF MR. JOHN S. EWART

The only speech I can remember ever having made that had in it any reference to war was delivered some years ago before a Licensed Victualers' Association. I had been reading some articles in the magazines laudatory of war and the social benefits of war, under such titles as "God's Test by War," "Moral Improvement by War," and so on. You know perfectly well the assertions usually found in such magazine articles. Well, the address to the Licensed Victualers' Association being an unremunerated occasion, I merely plagiarized those articles, and I spoke to the assembly of tavern keepers in somewhat the following way—at least, be good enough to imagine that I did address them in somewhat the following way:

"Gentlemen: Modern science has made it clear even to the stupidest of all the sobriety-fanatics that race improvement and individual improvement come only through strain and struggle.

Foolish philanthropists (as they call themselves) are endeavoring to reverse God's law. They are trying to make easy and monotonous the way to heaven, whereas you and I know perfectly well that that is the way to degradation and to death. Hitherto war, fortunately, has averted the evils which would attend the success of those pernicious notions; for in the past, war has made it necessary that men should be courageous and strong, and that they should be virtuous in order that they might be courageous and strong. During those heroic ages, liquor has been nobly linked with war. Hand-in-hand they have labored for the regeneration of our race, and have brought it to its present pitch of perfection. But the fanatics are now abolishing war; and it is becoming evident that mankind, for their elevation and their salvation, will have to depend upon drunkenness alone.

"Liquor, gentlemen, is the splendid protector of society. Without its beneficent influence the weak and diseased would drag out lives full of misery to themselves, and full of damage and danger to society. Law has surrounded these weaklings with the protection of sanitary safeguards. Gentlemen, that is flying in the face of great heaven. People ought not to be thus protected. They should not be withdrawn from the salutary operation of the great cosmic law. On the contrary, there ought to be a statute requiring everybody—men, women and children—to get rolling drunk at least once a month. That, gentlemen, is what I call God's Test by Liquor. That, gentlemen, is the only way to eliminate the degraded and the vicious, the only way by which the race can be made strong, and vigorous, and manly. If any one doubts the assertion, let him compare the abstemious East with the beer-imbibing German, the absinthe-loving Frenchman, or the whiskey-consuming Anglo-Saxon—let him compare them. I say, and let him acknowledge the splendid social benefits of debauchery.

"And, gentlemen, as we so well know, liquor is not only the principal factor in the maintenance of the physical superiority of the finest races, but it is undoubtedly a great moral uplifter. See how under its benign influence all meanness and sordidness and selfishness slip away; how the coward becomes courageous; how the brotherhood of man, almost effaced under the degrading conditions of present-day materialism, reasserts itself, and removes, for the time being at all events, all these foolish and adventitious distinctions which are the outcome of mere wealth, and rank, and intellect."

Ladies and gentlemen, leaving the Licensed Victualers' Association and the speech of which you have now some idea, I adjure Mr. Smiley to consider whether he is not on the wrong track; whether indeed, he is not on two wrong tracks—for I firmly believe that all the arguments that can be used in favor of war and

its ameliorating effects upon society are just as valid when used in the support of my proposition of universal drunkenness once a month. Mr. Smiley wants to abolish war and to prohibit liquor. May I ask him whether, in his philosophy, he has made any provision by which God shall be enabled to carry on His beneficent work throughout the universe without the aid of these agencies which hitherto He has always employed? It would be a cataclysmic calamity if, too late, we were to find out that He really could not do it. Will Mr. Smiley be good enough to consider what I have said and tell us, at the next Conference, what he thinks about it? (Laughter and applause.)

THE CHAIRMAN: In closing the morning session Mr. JUSTICE RIDDELL will add a word or two on a subject not treated in his very interesting address.

REMARKS OF HON. WILLIAM RENWICK RIDDELL, L. H. D.

"The spirit moves me" to say a word or two in regard to the subject-matter of the address of our friend from Georgia, General Meldrim.

I think it is a great mistake to suppose there is less law in uncivilized and partly civilized nations than in what we call wholly civilized nations. There is just as much law being administered amongst the wild Indians and by the Cadi in Morocco and by the Arab Sheik as by His Majesty's Court of King's Bench in Toronto or by the Supreme Court of the United States at Washington. But there is a radical difference between the two. The one, savage law, is the law of single instances; it is arbitrary. The law of civilized nations is the law of rule and of principle. The law which is administered by the Sheik is law for that particular case and he is not bound by anything he has said in the past, and he does not propose to be bound by anything he may expect to say in the future. The law in civilized nations is a law of rule, a law of line, of decision and principle; and so amongst us lawyers—although I am a judge I still at all events pretend to be a lawyer—we have a Latin saying which freely interpreted means, "Miserable is that state of servitude where the law is vague and uncertain, where the law is not fixed, and is uncertain."

Now to apply that. The object aimed at I hope by all lovers of peace is not international arbitration, but judicial settlement of international disputes; the settlement of international disputes, not by what happens to occur to the arbiters for the time being as the proper and reasonable thing to do in that particular case; but the decision of these international disputes according to some fixed principles, so that the nations will know where "they are at." Law, of course, is always a little—sometimes more than a

little—uncertain; I happen to know that. But still the law in our nations is more certain than in uncivilized nations; and the whole object of a conference like this is to advance from international arbitration to international judicial settlement on established principles.

That can be easily accomplished in time. I have practiced in the Supreme Court in Canada, in Quebec cases, where the theory is that the Court is not bound by previous cases; I have practiced in the Privy Council where the theory is that the Court is not bound by previous decisions, even its own; I have always tried to find a case, decided by that tribunal, in which a principle is laid down, for invariably notwithstanding theory that principle will be followed. Arbitration will lay down no principle; I defy any one to extract from any of the great international arbitrations which have taken place between nations one good and permanent principle. But judicial decisions will be reported and respected; and when once we get a permanent international court a body of international lawyers will rise up whose pride and glory, as indeed their business, it will be to adjust international disputes by interpreting and applying the decisions of the court previously made. That is what I desire to see. Let us look beyond arbitration, beyond the particular instance to the great principles to be handed down by some standing, judicial committee! (Applause.)

THE CHAIRMAN: The Conference stands adjourned until this evening at eight o'clock.

77

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